

No. 12375

United States
Court of Appeals
For the Ninth Circuit.

ALLEN SMILEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

FILED

DEC 22 1949

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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* Page numbering appearing at foot of page of Certified Transcript of Record.

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 20069

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AARON SMEHOFF, alias ALLEN SMILEY,
Defendant.

INDICTMENT

[U.S.C., Title 8, Sec. 746(a) (18)—Falsely
claiming citizenship;

U.S.C., Title 8, Sec. 152—False testimony
under oath before an immigrant inspector.]

The grand jury charges:

Count One

[U.S.C., Title 8, Sec. 746(a) (18)]

On or about June 21, 1947, in the County of Los Angeles, State of California, and within the Central Division of the Southern District of California, defendant Aaron Smehoff, alias Allen Smiley, did knowingly, wilfully, falsely and fraudulently represent to Thomas A. Cox, an employee of the Police Department of the City of Beverly Hills, California, said Thomas A. Cox being a person having good reason to inquire into the nationality status of the defendant, that he, the defendant, was a citizen of

the United States, whereas in truth and in fact, as the defendant then and there well knew, the defendant had not been naturalized, had not been admitted to citizenship, and was not otherwise a citizen of the United States. [2]

Count Three

[U.S.C., Title 8, Sec. 746(a) (18)]

On or about May 25, 1944, in the County of Los Angeles, State of California, and within the Central Division of the Southern District of California, defendant Aaron Smehoff, alias Allen Smiley, did knowingly, wilfully, falsely and fraudulently represent to J. E. Siu, a Deputy Sheriff of the County of Los Angeles, State of California, said J. E. Siu being a person having good reason to inquire into the nationality status of the defendant, that he, the defendant, was a citizen of the United States, whereas in truth and in fact, as the defendant then and there well knew, the defendant had not been naturalized, had not been admitted to citizenship, and was not otherwise a citizen of the United States. [4]

A True Bill

/s/ C. J. DORAN,

Foreman.

/s/ JAMES M. CARTER,

U. S. Attorney.

[Endorsed]: Filed May 19, 1948. [6]

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes Now the defendant, Allen Smiley, by his attorney, Otto Christensen, and moves the Court to (a) dismiss said indictment and (b) separately to dismiss each count thereof upon each and all of the following grounds.

I.

That separate and distinct offenses not of the same or similar character and not based on the same act or transaction, or on two or more acts or transactions connected together, or constituting parts of a common scheme or plan, are charged in one and the same indictment.

II.

That there is a misjoinder of offenses in one and the same indictment in that Counts One to Three each charge the defendant with violation of (U.S.C., Title 8, Sec. 746(a) (18), to wit, with fraudulently representing himself to be a citizen of the United States of America, etc., on sundry dates to different persons, each [7] of whom is described *an* an employee, of the City of Beverly Hills, the City of Los Angeles, or the Sheriff's Office of the County of Los Angeles, whereas Court Four of the indictment charges the defendant on a different date with a violation of U.S.C., Title 8, Sec. 152, to wit the crime of perjury, in a hearing before *an an* United States Inspector of Immigration.

III.

Each of Counts One, Two and Three of said indictment does not state facts sufficient to charge the defendant (a) with having committed any crime or offense against the United States of America, and (b) the matters alleged in said indictment do not constitute an offense against the laws of the United States of America.

IV.

That each of said Counts One, Two and Three of said indictment is bad and insufficient in law because it is so uncertain and indefinite in its allegations as not to inform the defendant of the nature and cause of the accusations against him, or thereby give reasonable notice of the specific charges against him, whereby he may properly prepare his defense, or to safeguard himself against a second prosecution for the same offense, in that it cannot be ascertained therefrom:

1. That there was any fraudulent purpose of the defendant in making the alleged statements of citizenship mentioned in said Counts.

2. How or in what manner alleged representation of citizenship was fraudulent.

3. In that it cannot be ascertained whether any of the said persons mentioned in said Counts, as the persons to whom the alleged false representation was made, (a) was one to whom the defendant was obligated to truthfully state the fact of citizenship,

or (b) that any of such persons had a legal right to inquire into [8] or an adequate legal reason for ascertaining the citizenship of the defendant.

4. That the descriptive allegation, "said....., being a person having good reason to inquire into the nationality status of the defendant," is insufficient in law, in that "good reason" (a) constitutes a conclusion, (b) of itself, fails to show a concomitant obligation to truthfully answer, (c) is ambiguous and uncertain, i.e. may be personal, arbitrary or statistical as distinguished from a legal reason which carries the counter legal obligation of a truthful answer, and (d) in itself may constitute a purely idle reason (although to them for their purposes a good reason), i.e. Gallup Poll for statistical purposes, curiosity, etc.

V.

That Count Four of said indictment does not allege sufficient facts to constitute an offense under the laws of the United States of America, and particularly the violation of U.S.C. Title 8, Sec. 152.

VI.

That Court Four of the indictment is bad and insufficient in law because it is so uncertain and indefinite in its allegations as not to inform the defendant of the nature and cause of the accusation against him, or thereby give reasonable notice of the specific charges against him, whereby he may properly prepare his defense, or to safeguard him

against a second prosecution for the same offense, in that it cannot be ascertained therefrom:

(a) That his testimony, to wit: "Q. About the time this case started you were also employed were you not by Harry Rothberg as personnel director in his stores"? "A. Yes," was a material fact in a matter arising under the laws of the United States of America and concern and relate to defendant's right to reside in the United States of America. [9]

(b) What the nature and character of the matter or proceedings were, allegedly arising under the laws of the United States of America, wherein the said testimony of employment would be a material fact concerning and relating to his right to reside in the United States of America, or whether or not he could be found to be a deportable alien, or would invoke an exercise of discretion upon the part of the Attorney General in the particulars alleged.

(c) How or in what manner said alleged testimony concerning employment was a material fact to any issue or related issue in any matter or proceeding arising under the laws of the United States of America and/or concerning and relating to defendant's right to reside in the United States of America.

/s/ OTTO CHRISTENSEN,

Attorney for Defendant. [10]

Points and Authorities

Misjoinder of Offenses

Rule 8, Federal Rules of Criminal Procedure,
Sub-Division (a)

Note to Rule Above:

“This rule is substantially a restatement of existing law.” 18 USCA Section 557.

McElroy v. United States, 164 U. S. 76 41
Law Ed. 355

Beaux Arts Dresses, Inc. v. United States,
9 Fed (2) 531

United States v. Interstate Properties, Inc.,
153 Fed (2) 469

United States v. Perlstein, 120 Fed (2) 276,
at 281

Counts One, Two and Three

United States v. Weber, 71 Fed. Sup. 88

Title 8, Section 746(a), Subparagraph 18, United
States v. Hess, 124 U. S. 483; 31 Law Ed. 516.

See United States v. Carll, 105 U. S. 611 and
United States v. Crunkshank, 92 U. S. 542, cited
in United States v. Weber, 71 Fed Sup. 88 (1947).

See also Lowenburg v. United States, 156 Fed (2)
22, CCA 10th, 1946, and United States v. Max, 156
Fed (2) 13, CCA 3rd.

Count Four

See cases cited preceding point.

The face of the indictment for perjury must show

that statements falsely made were material. *United States v. Seymour*, 50 Fed Sup 930.

An indictment for perjury must aver the facts, showing the [11] materiality of the oath in the proceeding in which it is taken. *United States v. Singleton*, 54 Fed. 488.

“An indictment for perjury must allege that the false oath was with reference to evidence or testimony of material facts, and, if it appears to the Court that they were not material the indictment will be insufficient though the materiality is alleged.”

United States v. Pettus 84 Fed. 791

Opinions of the Board of Review of the Central Office and Board of Appeals of the Immigration and Naturalization Service (U. S. Department of Justice). Copies of these opinions are now being obtained.

The issue of discretion by the Attorney General was and is a false and invalid issue in the immigration proceedings.

People v. Brophy, 120 Pac. (2) 946

Rules and Regulations under this section have force and effect of law.

Haff v. Shee (C.C.A. Cal.) 63 Fed (2) 191
Sec. 222, Title 8, U.S.C. “Rules and Regulations”

(G) p. 848 Immigration and Nationality Laws and Regulations.

(c) Sec. 19, Immigration, Oct. 1917 (U.S.C. Title 8), Section 155.

Ex Parte T Nagata (Cal. D.C.) 11 Fed (2) 178

“Deportation under warrant can only be made for cause charged and stated therein.”

Respectfully submitted,

/s/ OTTO CHRISTENSEN,

Attorney for Defendant.

Affidavit of Service by mail attached.

[Endorsed]: Filed June 3, 1948. [12]

At a stated term, to wit: The February Term. A.D. 1948, of the District Court of the United States of Amercia, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 19th day of July in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable C. E. Beaumont,
District Judge.

[Title of Cause.]

Court gives oral opinion and denies motion of defendant to dismiss as to counts 1, 2, and 3 and grants motion as to count 4.

Otto Christensen, Esq., appearing as counsel for defendant, states defendant is ready to plead and waives reading of the Indictment. Defendant pleads not guilty to each of counts 1, 2, and 3. And, there being no objection, Court permits defendant to remain on O/R in these proceedings and orders case

transferred to calendar of Judge Harrison for setting for trial.

E. A. Tolin, Ass't U. S. Att'y, is present for Gov't. [14]

[Title of District Court and Cause.]

INDICTMENT

[U.S.C., Title 8, Sec. 746(a) (18)—False claim of citizenship.]

The grand jury charges:

On or about November 1, 1945, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Aaron Smehoff, alias Allen Smiley, did knowingly, wilfully, falsely, and fraudulently represent to the Los Angeles Police Department, a department and agency of the City of Los Angeles, State of California, having good reason to inquire into the nationality status of the defendant, that he, the defendant, was a citizen of the United States, whereas, in truth and in fact, as the defendant then and there well knew, the defendant had not been naturalized, had not been admitted to citizenship, and was not otherwise a citizen of the United States.

A True Bill

/s/ A. H. LONG,

Foreman.

/s/ JAMES M. CARTER,

U. S. Attorney.

EAT:AH

[Endorsed]: Filed March 23, 1949. [15]

At a stated term, to wit: The February Term. A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 7th day of June in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Jacob Weinberger,
District Judge.

[Title of Cause.]

For arraignment and plea; E. A. Tolin, Ass't U. S. Att'y, appearing as counsel for Gov't; Otto Christensen, Esq., appearing as counsel for defendant, who is present on bond of \$500.;

Attorney Christensen moves to dismiss the Indictment and adopts his written motion to dismiss made in Case No. 20,069-Cr. as to grounds III and IV thereof, and Attorney Tolin opposes said motion on same argument made in Case No. 20,069-Cr. Counsel submit motion to the Court and it is ordered that motion is denied, and that defendant's plea be taken.

Defendant states his true name is Allen Smiley, acknowledges receipt of a copy of the Indictment, waives reading thereof, and pleads not guilty.

Court orders this cause consolidated for trial with Case No. 20,069-Cr. on Court's own motion and with consent of defendant, and Court orders the said consolidated causes set for trial 10 A.M., July 12, 1949.

On motion of Attorney Christensen it is ordered that Robert Neeb, Esq., is associated as counsel for defendant. [16]

At a stated term, to wit: The February Term. A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 12th day of July in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Dave W. Ling,
District Judge.

[Title of Cause.]

These consolidated causes coming on for jury trial; James M. Carter, U. S. Att'y, and E. A. Tolin and Jack E. Hildreth, Ass't U. S. Att'ys, appearing as counsel for Gov't; Otto Christensen and Robert Neeb, Esqs., appearing as counsel for defendant, who is present on O/R; and both sides answering ready, it is ordered that a jury be impaneled. The clerk draws the names of twelve jurors, who take places in the jury box.

Attorney Tolin makes a statement to the prospective jurors in regard to this cause, at request of the Court. Attorney Christensen makes a statement. Counsel for defendant examine the jurors in the box for cause.

The jurors now in the box are examined for cause and passed for cause.

Frank Factor is excused by Gov't and clerk draws name of Benj. Kelman, who is examined and passed for cause.

Marvel A. Morse is excused by defendant and clerk draws name of Arthur W. Stillwell, who is examined and passed for cause.

James F. McDonald is excused by defendant and clerk draws name of Clara A. Knight, who is examined and passed for cause.

Arthur W. Stillwell is excused by Gov't and clerk draws name of Victor Montgomery, who is examined and excused for cause by the Court, and clerk draws name of Theresa Drew, who is examined and passed for cause. [18]

Lula J. Updigraff is excused by Gov't and clerk draws name of Katherine Jackson, who is examined and passed for cause.

Katherine Jackson is excused by defendant and clerk draws name of Matilda Turner, who is examined and passed for cause.

Louise Dermody is excused by Gov't and clerk draws name of George A. Allers, who is examined and passed for cause.

George A. Allers is excused by defendant and clerk draws name of Leo A. Coutt, who is examined and passed for cause.

Cleora A. Lethen is excused by defendant and clerk draws name of Minnie Yodow, who is examined and passed for cause.

Leo E. Coutt is excused by Gov't and clerk draws name of Louella H. Rose, who is examined and passed for cause.

Matilda Turner is excused by defendant and clerk draws name of Robert Titus, who is examined and passed for cause.

Mary A. Winnie is excused by defendant and clerk draws name of Robert V. Rogers, who is examined and passed for cause.

Robert V. Rogers is excused by defendant and clerk draws name of Bertha M. Nunan, who is examined and passed for cause.

Bertha M. Nunan is excused by Gov't and clerk draws name of Mable H. Folsom, who is examined for cause.

At 11:30 A.M. the Court admonishes the prospective jurors not to discuss this cause and declares a recess. At 11:45 A.M. court reconvenes herein and all being present as before, including the prospective jurors, and defendant, and counsel so stipulating, Court orders trial proceed.

Mable H. Folsom, heretofore examined, is passed for cause.

Robert Titus is excused by defendant and clerk draws name of David Kay, who is examined and passed for cause.

And there being no further peremptory challenges, the jurors now in the box are accepted by both sides and sworn as the jury for this trial, viz:

The Jury

1. Lyman Haughland
2. David Kay
3. Caroline A. Resch
4. Clara A. Knight
5. Benj. Kelman
6. Minnie Yodow
7. M. W. Kroopen
8. Louella H. Rose
9. Mable H. Folsom
10. Theresa Drew
11. Margaret S. Pierce
12. Wm. H. Klein

The Court orders that the prospective petit jurors present who were not impaneled for this trial are excused until notified. [19]

At 11:55 A.M. Court admonishes the jury not to discuss this cause and declares a recess to 2 P.M.

At 2:06 P.M. court reconvenes herein and all being present as before, including defendant, counsel for both sides, and the jury, and counsel so stipulating, Court orders trial proceed.

Attorney Tolin makes opening statement to the Court and jury in behalf of Gov't. Counsel for defendant reserve opening statement.

Attorney Neeb makes a motion in behalf of defendant to exclude all witnesses from the court room. Attorney Tolin makes a statement as to the said motion to exclude witnesses. Pursuant to request of defendant, Court orders that all witnesses are excluded from the court room, until called.

Gov't Ex. 1 to 10 incl. are marked for ident.

Lillian M. Hoover is called, sworn, and testifies for Gov't. Gov't Ex. 8 is admitted in evidence.

Ray M. Griffin is called, sworn, and testifies for Gov't. Gov't Ex. 3 is admitted in evidence.

I. E. Sier is called, sworn, and testifies for Gov't. Gov't Ex. 4 is admitted in evidence.

At 3:10 P.M. Court admonishes the jury not to discuss this cause and declares a recess. At 3:25 P.M. court reconvenes herein and all being present as before, including defendant, counsel for both sides, and the jury, and counsel so stipulating, Court orders trial proceed.

Ralph W. Becker, Frank H. Cunningham, and Orville E. Harper, respectively, are called, sworn, and testify for Gov't. Gov't Ex. 11 and 12 are marked for ident., and Gov't Ex. 9 is admitted in evidence.

Thos. A. Cox is called, sworn, and testifies for Gov't.

At 4:15 P.M. Court admonishes the jury not to discuss this cause and declares a recess in this trial until 10 A.M., July 13, 1949. [20]

[Title of District Court and Cause.]

FALSELY CLAIMING CITIZENSHIP

Comes Now the defendant, Allen Smiley, before the introduction of any evidence in the case, and requests the Court to instruct the jury in this case by giving the jury each and every one of the instructions hereto attached, which said instructions are submitted to the Court on this 7th day of June, 1949. Said the instructions hereto attached are marked from numbers 1 to 32, inclusive.

The defendant reserves the right to present further requests for instructions on the ground that he cannot, in advance of the testimony of the case, anticipate all instructions he deems right and proper. At the close of the testimony, the defendant proposes to present further requests for instructions.

/s/ ALLEN SMILEY,

Defendant.

/s/ OTTO CHRISTENSEN,

Attorney for Defendant.

CONTENTS OF PRELIMINARY REQUESTS TO CHARGE

1. Indictment no evidence of guilt.
2. Issue is presented by specific charge in the indictment, which is to be decided solely on evidence and not on conjecture, passion, prejudice, etc.
3. Jury sole judges of facts.

4. Jury not to be influenced by anything except evidence and not to be influenced by rulings or comments of the Court.

5. Judge facts only upon testimony and evidence in this case. Disregard evidence stricken out. Disregard any intimation in any question.

6. Rulings of the Court are not to be taken as any indication of guilt or innocence. Counsel are charged with duty of objecting.

7. Rule regarding failure of defendant to testify.

8. Plea of not guilty serves as continuing denial.

9. Presumption of innocence.

10. Reconcile testimony with innocence.

11. Reasonable doubt defined. Evidence must establish truth of charges to a moral certainty. Chief Justice Shaw instruction.

12. Reconcile any and all circumstances and whole evidence of case with innocence of defendant.

13. Definition of word, "innocence."

14. Circumstantial evidence must exclude every hypothesis of guilt, hypothesis of guilt must flow naturally from facts proved.

15. Every fact or circumstance must be proved beyond a reasonable doubt before it may be considered.

16. Charge in indictment.

17. The six elements of each count of indictment.

18. Defining "good reason."

19. In furtherance of official authority and duty.

20. Person inquiring must have right or adequate reason in furtherance of his official authority.

21. False statement insufficient if mere boast or jest, etc.

22. "Falsely" defined as "perfidiously," "treacherously" or "with intent to defraud."

23. "Willful" defined and applied. [22]

24. Person inquiring must be engaged in inquiry making nationality status relevant and material.

25. Representation must be made for a fraudulent purpose.

26. Fraudulent purpose applied to this case.

27. Statements made to persons named not in course of judicial proceedings or under oath—questions concerning citizenship immaterial to matters under question and defendant under no legal requirements to answer.

28. Defendant not required to answer as to citizenship on local investigations and charges.

29. Same.

30. Inquiry by police officer in connection with arrest for gambling imposes no obligations to answer truthfully.

31. Individual opinion of jurors required.

32. Individual opinion of jurors required. [23]

INSTRUCTION No. 2

We are here for the purpose of trying the issues of fact that are presented by the specific charge in this indictment only and the plea of the defendant thereto. This duty you should perform unin-

fluenced by passion or prejudice on account of the nature of the charge against the defendant. You are to be governed, therefore, solely by the evidence introduced in this trial, and the law as given you by the Court. The law will not permit jurors to be governed by conjecture, passion or prejudice, public opinion or public feeling.

[In pencil]: Insert in General Charge.
Given:

.....
Judge. [24]

INSTRUCTION No. 1S

The burden of proof is upon the prosecution to prove the guilt of the defendant by evidence beyond a reasonable doubt. (The defendant is not called upon to produce any evidence whatsoever as to his innocence.) All of the presumptions of law, independent of evidence, are in favor of the innocence of the defendant. The law presumes the defendant who has been charged with a criminal offense to be innocent until his guilt has been proven beyond all reasonable doubt. This presumption of innocence abides with the defendant throughout the trial and entitled the defendant to a verdict of not guilty unless the evidence in the case, when taken as a whole, satisfies you of defendant's guilt beyond a reasonable doubt.

Given:

/s/ DAVE W. LING,
Judge.

[In pencil]: Insert in General Charge. [25]

INSTRUCTION No. 7

The failure of a defendant to take the witness stand and testify in his own behalf does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against such defendant nor should this fact enter into the discussions or deliberations of the jury in any manner.

Given:

/s/ DAVE W. LING,
Judge.

See: Bruno v. U.S. 308 U.S., 287,292. [26]

INSTRUCTION No. 8

A defendant's plea of not guilty to the indictment puts in issue every material allegation of fact contained in the indictment. (You are further instructed that throughout the trial the defendant's plea of not guilty serves as his "continuing denial of the evidence offered against him by the prosecution pursuant to its ever present burden of proof.")

Given:

/s/ DAVE W. LING,
Judge.

See: U.S. v. DeAngelo (CAA 3) 8319; Prettyman v. U.S. 180 F. 30, 42 (CCA 6); Smith v. U.S. 28 F. 131, 133 (CCA 8). [27]

INSTRUCTION No. 13

You must clearly bear in mind that when the Court speaks of innocence, or of a circumstance being susceptible of a hypothesis of innocence, the word innocence is not used in the sense of pure, moral, free from venality, or free from wrongdoing. What is meant is innocence of the particular and specific crime charge in the indictment.

Given:

/s/ DAVE W. LING,
Judge. [28]

INSTRUCTION No. 14

Circumstantial evidence, to warrant a conviction in a criminal case, must be of such character as to exclude every reasonable hypothesis but that of guilt of the offense charged to have been committed by the defendant, or in other words, the facts proved must be all consistent with and point to his guilt only, and inconsistent with his innocence. The hypothesis of guilt should flow naturally from the facts proved, and be consistent with them all. If the evidence can be reasonably reconciled either with the theory of innocence or with guilt, the law requires that the defendant be given the benefit of the doubt, and that the theory of innocence be adopted.

Given:

/s/ DAVE W. LING,
Judge.

U.S. v. Daneri, Case No. 1963 (Judge Yankwich); Nichola v. U.S. 72 Fed. (2d) 780; Paddock v. U.S. 79 Fed. (2d) 872, 876; Coffin v. U.S. 156 U.S. 432. [29]

INSTRUCTION No. 17

You are instructed that under the charge in each count of this indictment that the burden is on the prosecution to establish beyond a reasonable doubt each of the following elements:

1. That the defendant was not at the time of making the alleged representation a citizen of the United States.

2. That he made the representation to the person mentioned in the indictment.

3. That at the time of making said representation that the defendant then and there knew that it was false.

4. That the defendant willfully made such false representation.

5. That he fraudulently made the representation of citizenship.

6. That the person to whom such representation was made had a good reason to inquire into the nationality status of the defendant.

Given:

/s/ DAVE W. LING,
Judge. [30]

INSTRUCTION No. 19

The Court instructs you with reference to the allegation in the indictment that the person to whom the alleged false representation of citizenship was made “had a good reason to inquire into the nationality status of the defendant” that the phrase “good reason to inquire” means more than any reason, or which might be deemed by such person inquiring to be a good reason; it means as applied to this case that the public officer inquiring had an adequate reason or right in law in furtherance of his official authority and duty to ascertain the defendant’s citizenship.

Given:

/s/ DAVE W. LING,
Judge.

U.S. v. Achtner (CCA2), 144 Fed. (2) 49, 51;
U.S. v. DePratu (CCA), 171 Fed (2) 75, 76. [31]

INSTRUCTION No. 21

You are further instructed that even though you find that the defendant made a false representation of citizenship to the persons or any one of the persons named in the indictment, you must nevertheless find the defendant not guilty if you find such representation was made “as a mere boast” or “jest” or “to stop the prying of some busy-body.”

Given:

/s/ DAVE W. LING,
Judge.

INSTRUCTION No. 22

You are further instructed that the word, "falsely," as used in this indictment suggests more than a mere untruth and includes "perfidiously," "treacherously," or "with intent to defraud." As applied to this case, false representation or claim of citizenship must be made to one who has a right to inquire into or has an adequate reason for ascertaining the citizenship of the one making the representation or claim.

Given:

/s/ DAVE W. LING,
Judge.

U. S. v. Achtner (CCA2), 114 Fed. (2) 49, 51

U. S. v. Tenderic (CCA7), 152 Fed. (2) 3, 5

U. S. v. Weber, 71 Fed. Sup. 88 [33]

INSTRUCTION No. 23

~~You are further instructed, even though you believe beyond a reasonable doubt that the defendant did represent to the person named in any count of the indictment that he, the defendant, was a citizen of the United States, and that such representation was in fact untrue, before you may convict on such count you must further find beyond a reasonable doubt that such representation was not due to surprise, inadvertence or mistake, or duress, but due to "willfulness." "Willfulness" means more than "intentional" or "voluntary"; it means done with a bad purpose, without justifiable excuse, without ground for believing it lawful.~~

As applied to this case, "willfulness" means that before you may convict, you must believe beyond a reasonable doubt the defendant represented that he was a citizen of the United States as alleged, and that such representation was not only knowingly false but also given with a bad purpose, without justifiable excuse, and without ground for believing it lawful.

Given:

/s/ DAVE W. LING,

Judge.

U. S. v. Murdock, 73 L. Ed. 22 5

People v. Turner, 122 Cal. 679, 55 P. 685

U. S. v. Smiley (Cr. 20188), Instruction
given by Judge Beaumont. [34]

INSTRUCTION No. 7S

~~The charge in this case is that the defendant falsely represented himself to be a citizen of the United States. It is not sufficient to merely show an answer of "yes" to an oral or written question concerning citizenship asked by a local peace officer in connection with a booking concerning an alleged violation of local or state gambling laws or in connection with an interview while held as a material witness.~~

(You are instructed, that to "represent oneself" as a citizen, as set forth in the indictment, means to hold oneself forth as, and to affirmatively claim to be, a citizen of the United States.) and the mere answering of a question as to whether one is a citizen asked of him by an arresting officer in connection with an alleged violation of local, municipal or

~~state law, in and of itself does not constitute representing, as that term is used in the indictment.~~

Given: As Modified

/s/ DAVE W. LING,
Judge. [35]

INSTRUCTION No. 24

~~You are further instructed that even though you believe without a reasonable doubt that the defendant falsely represented himself to be a citizen of the United States to a person inquiring as to his nationality status, as alleged in the indictment or any count thereof, Before you can convict, you must further find beyond a reasonable doubt that the person inquiring concerning the Nationality Status of def. was engaged in an inquiry concerning a matter which made the nationality status of the defendant relevant and material to the matter under consideration.~~

Given:

/s/ DAVE W. LING,
Judge.

See above cases supra:

U. S. v. Achtner;

U. S. v. Tenderic;

U. S. DePratu; and

U. S. v. Weber, 71 Fed. Sup 88. [36]

[Proposed instruction, with modifications by District Judge as shown in italics.]

INSTRUCTION No. 25

You are further instructed, even though you believe beyond a reasonable doubt that the defendant did represent to the person named in a count of the indictment that he, the defendant, was a citizen of

Before you can the United States, and that such representation was in fact untrue, before you may convict on such ~~count you must further find beyond a reasonable doubt that such~~ representation was not only knowingly false and due to willfulness, but was made for a fraudulent purpose.

Given:

/s/ DAVE W. LING,

Judge.

U. S. v. Achtner (CCA2), 144 Fed. (2) 49,
51;

U. S. v. Tenderic (CCA7), 152 Fed. (2)
3, 5;

U. S. v. Weber, 71 Fed. Sup. 88. [37]

[Proposed instruction, with modifications by
District Judge as shown in italics.]

INSTRUCTION No. 26

As applied to this case, “fraudulent purpose” means ~~that before you may convict the defendant you must believe beyond a reasonable doubt that~~ such representation was not only knowingly false and due to willfulness but was made with intent to deceive such persons as to a material matter.

Given:

/s/ DAVE W. LING,

Judge.

U. S. v. Achtner (CCA 2), 144 Fed. (2) 49, 51;

U. S. v. Tenderic (CCA7), 152 Fed. (2) 3, 5;

U. S. v. Weber, 71 Fed. Sup. 88.

See cases cited p. 52, Achtner case supra. [38]

INSTRUCTION No. 27

Testimony has been received that the defendant on one occasion was interviewed by city police officers of Beverly Hills, California, during the course of an investigation into the commission of an offense against the State of California. Also testimony has been received concerning routine interrogation of the defendant by municipal and county police officers at the time of his arrest and routine booking for violation of local gambling laws. Statements made by the defendant on those occasions were not made in the course of any judicial proceedings or under oath. The questions asked concerning his citizenship were all immaterial to the particular investigation and charges, and the defendant was not under any legal requirements to answer such questions.

Refused:

/s/ DAVE W. LING,
Judge. [39]

INSTRUCTION No. 28

The person arrested on a charge of violating municipal or state laws, or who is the subject of an investigation concerning a violation of municipal

or state laws, is not required to answer any questions whatsoever put to him by the municipal or state arresting or investigating officers concerning his place of birth or citizenship.

Refused:

/s/ DAVE W. LING,
Judge. [40]

INSTRUCTION No. 29

A person interviewed by police officers of a city or county in connection with an investigation into the alleged commission of a local offense, even though the investigation concerns the acts and conduct of a third person, is not compelled in law to answer any questions put to him by such officers as to his citizenship or where he was born.

Refused:

/s/ DAVE W. LING,
Judge. [41]

INSTRUCTION No. 30

Inquiry by a city or county police officer in connection with the arrest of an individual for an alleged violation of gambling laws as to the place of such individual's birth or citizenship does not impose upon such individual any legal obligation to answer such question truthfully.

Refused:

.....
Judge [42]

INSTRUCTION No. 32

While it is the duty of the jurors to confer and deliberate with one another before arriving at a verdict, nevertheless, the verdict which you render must represent the real judgment and honest conclusion of each of you. If any juror, after such deliberation, conscientiously reaches a decision on the facts, he has no right to surrender his decision to the opinion of the majority for the purpose of preventing a disagreement or for the purpose of arriving at a compromise.

Given:

/s/ DAVE W. LING,
Judge.

[Endorsed]: Filed Aug. 29, 1949. [43]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by the plaintiff and defendant in the above-entitled cause, through their respective attorneys, that Supplemental Instructions 8s and 9s be included in the transcript of record on appeal by the Clerk of this Court.

Dated this 4th day of October, 1949.

/s/ JAMES M. CARTER,
By /s/ ERNEST A. TOLIN,
His Assistant,
Attorney for Plaintiff.
/s/ OTTO CHRISTENSEN,
Attorney for Defendant.

INSTRUCTION No. 8S

Mere spoken words by the person arrested for an alleged violation of local, municipal or state gambling laws by a peace officer as to whether the person arrested was a citizen, is not of itself a claim to United States citizenship.

Given:

.....

Judge. [45]

INSTRUCTION No. 9S

You are instructed that when the Court uses the language "in furtherance of his official authority and duty," this phrase means something more than any act by an officer, even though said act be performed in connection with his employment; it means an act authorized by law and in furtherance of a duty imposed upon him by law.

Given:

.....

Judge.

[Endorsed]: Filed Oct. 5, 1949. [46]

[Title of District Court and Cause.]

VERDICT

We the Jury in the above-entitled cause find the defendant Allen Smiley, charged as Aaron Smehoff, Guilty as charged in Count 1 of the indictment; and Guilty as charged in Count 3 of the indictment.

/s/ M. N. KROOPEN,
Foreman.

Dated: July 14, 1949.

[Endorsed]: Filed July 14, 1949. [47]

(Title of District Court and Cause.)

VERDICT

We the Jury in the above entitled cause find the defendant Allen Smiley, Guilty as charged in the indictment.

Dated: July 14, 1949.

/s/ M. N. KROOPEN,
Foreman.

Dated: July 14, 1949.

[Endorsed]: Filed July 14, 1949. [48]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes Now the defendant, Allen Smiley, and

moves the Court to grant him a new trial for the following reasons:

1. The Court erred in failing to give the series of instructions requested by the defendant to the effect that he was not required to answer questions put to him by the police officers at the time of his arrest.

2. The Court erred in permitting testimony concerning the comity arrangements between police agencies in exchanging information concerning arrests.

3. The verdict of "Guilty" under the state of the evidence was contrary to the Court's instructions.

4. The evidence was insufficient to establish the offense.

/s/ OTTO CHRISTENSEN,

/s/ ROBERT NEEB,

Attorneys for Defendant.

Receipt of copy attached.

[Endorsed]: Filed July 19, 1949. [49]

[Title of District Court and Cause.]

MOTION IN ARREST OF JUDGMENT

Comes Now the defendant, Allen Smiley, and moves the Court to arrest judgment, for the reasons that each of the counts of the indictment fails

to charge an offense, and the court is without jurisdiction to enter judgment of the offense.

/s/ OTTO CHRISTENSEN,

/s/ ROBERT NEEB,

Attorneys for Defendant.

Receipt of copy attached.

[Endorsed]: Filed July 19, 1949. [50]

At a stated term, to wit: The February Term. A. D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 1st day of August, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Dave W. Ling,
District Judge.

[Title of Cause.]

For (1) hearing motion of defendant for new trial and motion of defendant in arrest of judgment, (2) sentence on counts 1 and 3, and (3) disposition of count 2; count 4 having been heretofore dismissed; E. A. Tolin, Ass't U.S. Att'y, appearing as counsel for Gov't; Otto Christensen, Esq., appearing as counsel for defendant, who is present on O/R;

Attorney Christensen argues in support of motion of defendant for a new trial and in arrest of judgment. Attorney Tolin replies.

Court pronounces judgment as follows: * * *

Court orders motion for new trial and in arrest of judgment denied, but inasmuch as there is a debatable question, the defendant will be admitted to bail in the sum of \$10,000., pending appeal.

On motion of Attorney Tolin it is ordered that count 2 of Indictment is dismissed. Court further orders defendant released to custody of Otto Christensen, Esq., his attorney. [52]

At a stated term, to wit: The February Term. A. D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 1st day of August, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable: Dave W. Ling,
District Judge.

[Title of Cause.]

For (1) hearing motion of defendant for new trial and motion of defendant in arrest of judgment, and (2) sentence; E. A. Tolin, Ass't U.S. Att'y, appearing as counsel for Gov't; Otto Christ-

ensen, Esq., appearing as counsel for defendant, who is present on O/R; Court orders motion (1) denied, and pronounces judgment as follows: * * *

District Court of the United States for the Southern District of California, Central Division
No. 20069-Criminal

UNITED STATES OF AMERICA,

vs.

ALLEN SMILEY.

JUDGMENT AND COMMITMENT

On this first day of August, 1949, came the attorney for the government and the defendant appeared in person and by counsel, Otto Christensen, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of falsely claiming citizenship in violation of Section 746(a)(18), Title 8, U. S. Code, as charged in each of counts one and three of the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) year on count one of the Indictment in an institution to be selected by the Attorney General, and in addition thereto pay a fine unto the United States of America in the sum of \$1000.00; and, on count three of the Indictment, for a period of one (1) year in an institution to be selected by the Attorney General, and in addition thereto, pay a fine unto the United States of America in the sum of \$1000.00; said sentence of imprisonment on count one to begin and run concurrently with sentence of imprisonment on count three.

It Is Adjudged that on motion of the U. S. Attorney, count two of the Indictment is hereby dismissed.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ DAVE W. LING,
U. S. District Judge.

[Endorsed]: Filed Aug. 1, 1949. [53]

District Court of the United States for the
Southern District of California, Central Division
No. 20604-Criminal

UNITED STATES OF AMERICA,

vs.

ALLEN SMILEY.

JUDGMENT AND COMMITMENT

On this first day of August, 1949, came the attorney for the government and the defendant appeared in person and by counsel, Otto Christensen, Esq.,

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of false claim of citizenship in violation of Section 746(a)(18), Title 8, U.S. Code, as charged in the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year in an institution to be selected by the Attorney General, and in addition thereto to pay a fine unto the United States of America in the sum of \$1000.00; said term of imprisonment to begin and run concurrently with

sentene of imprisonment of one year imposed in case No. 20069-Criminal, United States of America, v. Allen Smiley.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ DAVE W. LING,
U. S. District Judge.

[Endorsed]: Filed Aug. 1, 1949. [55]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Allen Smiley, Sunset Plaza,
Los Angeles, California, Appellant.

Otto Christensen, 541 South Spring Street, Los Angeles 13, California, and Robert Neeb, Chester Williams Building, Los Angeles 13, California, attorneys for Appellant.

Offense: Appellant was convicted on July 14, 1949, of a violation of U.S.C., Title 8, Sec. 746(a) (18), charging in three counts of an indictment that Appellant on or about June 21, 1947, November 1, 1945, and May 25, 1944, to certain persons described as peace officers falsely represented himself to be a citizen of the United States of America.

Date of Judgment: July 25, 1949.

Judgment and/or sentence: Committed to cus-

tody of Attorney General for one year on count one and a \$1000. fine; the same on count three of indictment #20069; the same on indictment #20604; said sentences to run concurrently. Said appellant is now at large on bail pending determination of his appeal. [56]

Name of prison where now confined, if not on bail:

I, the above-named Appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment above mentioned on the grounds set forth below.

ALLEN SMILEY,

Appellant.

By /s/ OTTO CHRISTENSEN,

OTTO CHRISTENSEN and

ROBERT NEEB,

Attorneys for Appellant.

By /s/ OTTO CHRISTENSEN.

1. That each count of the indictment fails to allege facts to constitute an offense under the laws of the United States.

2. That the Court was without jurisdiction to pronounce judgment and sentence.

3. That the Court erred in overruling Appellant's Motion to Dismiss said indictment and each count thereof upon each of the grounds separately stated in his Motion to Dismiss.

4. That the Court erred in his overrulings in the admission of testimony on the trial.

5. That the Court erred in his overrulings in the exclusion of testimony on the trial.

6. That the Court erred in failing to grant Appellant's Motion at the conclusion of all of the evidence to dismiss each count of the indictment and/or direct the jury to find the Defendant not guilty as to each count of the indictment.

7. That Court erred in failing to give certain instructions to the jury as requested by the Appellant.

8. That the Court erred in giving certain instructions to the jury to which instructions the Appellant duly excepted. [57]

9. The verdict of guilty was inconsistent with, contrary and repugnant to the Court's instructions to the jury.

10. The Court erred in overruling Appellant's Motion in Arrest of Judgment.

11. The Court erred in pronouncing judgment and sentence.

OTTO CHRISTENSEN and
ROBERT NEEB,

Attorneys for Appellant,

By /s/ OTTO CHRISTENSEN.

[Endorsed]: Filed Aug. 1, 1949. [58]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL, AND DESIGNATION OF PARTS OF RECORD NECESSARY FOR CONSIDERATION THEREON

Points on Which Appellant Intends to
Rely on Appeal

I.

The Court erred in overruling Appellant's Motion to Dismiss counts one and three of Indictment 20069 and Indictment 20604.

II.

The Court erred in its rulings on the admission of testimony and exhibits.

III.

The Court erred at the conclusion of all of the evidence in the case to grant Defendant's Motion for Judgment of Acquittal and to dismiss on the grounds that the evidence was insufficient to establish the offense charged as to each count of the Indictment 20069 and Indictment 20604.

IV.

The Court erred in its instructions to the jury.

V.

The Court erred in failing to give instructions to the jury requested by the Defendant.

VI.

The evidence was insufficient to establish the offense.

VII.

The verdict was inconsistent with, contrary and repugnant to the Court's instructions.

IX.

The Court erred in denying Defendant's Motion in Arrest of Judgment.

X.

The Court erred in imposing Judgment and Sentence.

Designation of Record

Print the entire transcript of record as filed by the Clerk of the District Court.

OTTO CHRISTENSEN,

Attorney for Appellant.

/s/ OTTO CHRISTENSEN.

Receipt of copy acknowledged.

[Endorsed]: Filed Aug. 22, 1949. [60]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the United States District Court:

1. Counts one and three of Indictment 20069, and Indictment 20604.

2. Motions to Dismiss Indictment 20069, and

Order of Court thereon; Stipulation re Motion to Dismiss Indictment 20604; Court Reporter's transcript re Motion to Dismiss Indictment 20604 and Court's Order thereon.

3. Plea of Defendant to said Indictments.

4. Such necessary recitation of impanelment of jury to show a jury trial was had.

5. Court Reporter's transcript of all the testimony and proceedings of the trial; and Court Reporter's transcript of proceedings on the settlement of instructions, and the instructions given and refused.

6. Certification of all exhibits and/or photostatic copies thereof to be included. [63]

7. Order of Court denying Motions to Dismiss Indictments.

8. Order of Court denying Motions for Acquittal and Judgment of Dismissal, at the conclusion of the evidence in the case.

9. Verdicts.

10. Motions for New Trial and Arrest of Judgment, and Orders of Court thereon.

11. Judgments and Sentences and Reporters' Transcript thereon.

12. Notice of Appeal.

13. Designation of Points relied on.

/s/ OTTO CHRISTENSEN,
Attorney for Defendant.

Receipt of copy attached.

[Endorsed]: Filed Aug. 22, 1949. [64]

United States District Court for the Southern
District of California, Central Division
No. 20,069

UNITED STATES OF AMERICA,
Plaintiff,
vs.

AARON SMEHOFF, alias ALLEN SMILEY,
Defendant.

Honorable Jacob Weinberger, Judge Presiding.

REPORTER'S
TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiff:

JAMES M. CARTER,
United States Attorney; by
ERNEST A. TOLIN,
Assistant United States Attorney.

For the Defendant:

OTTO CHRISTENSEN, ESQ.,
1212 Spring Arcade Building,
Los Angeles, California. [1*]

June 7, 1949, 10:00 o'clock A.M.

The Court: Call the calendar.

The Clerk: No. 20,069, Criminal, United States
vs. Allen Smiley.

Mr. Tolin: The government is ready.

The Clerk: Is anyone here for the defendant?
Is the defendant present?

* Page numbering appearing at top of page of original Reporter's Transcript.

The Court: He probably has gone to Judge McCormick's court.

The Clerk: No. 20,604, Criminal, United States vs. Aaron Smehoff.

Mr. Tolin: The government is ready.

The Court: Are there arraignments to be had here?

Mr. Christensen: Yes. I think under the stipulation, your Honor, that was signed to consent to the arraignment and plea on this day, there is a substitute for Count 2, upon which the defendant has not been arraigned. That consent also carried with it, your Honor, the stipulation that the motions heretofore filed would be considered as having been filed to this substitute for Count 2.

The Court: Those motions are what?

Mr. Christensen: Specifically, your Honor, the indictment [2] on which the motion for a bill of particulars was filed was Case 20,069. It is an indictment in four counts and the one now is 20,604.

The Court: That indictment is in one count?

Mr. Christensen: Yes, your Honor; and that is really taking the place of Count 2 of the old indictment, 20,069. And we want the benefit of the motion to dismiss and the motion for a bill of particulars to this new count, 20,064.

Mr. Tolin: There wasn't a motion for a bill of particulars as to those counts.

Mr. Christensen: I think that is right. That was as to the fourth count of the old indictment, to which Judge Beaumont sustained a demurrer, leav-

ing it upon the three counts.

The Court: This was a motion to dismiss,
Mr. Christensen: Yes; upon sundry grounds,
your Honor.

The Court: And the same principles involved
that you urged before?

Mr. Christensen: The same principles are in-
volved here and they are identical.

The Court: You may state generally into the
record just what your motion is.

Mr. Christensen: The motion as to indictment
20,069, which I want to apply to indictment 20,604,
is that the count does not state facts sufficient to
charge the defendant (a) with having committed
any crime or offense against the United [3] States
of America, and (b) the matters alleged in said
indictment do not constitute an offense against the
laws of the United States of America.

That was Part III in my motion to dismiss the
previous indictment.

And my ground IV in that motion is this, which
I adopt for the indictment and to the indictment
20,604: That each of said Counts 1, 2 and 3 of said
indictment is bad and insufficient in law because it
is so uncertain and indefinite in its allegations as
not to inform the defendant of the nature and
cause of the accusations against him, or thereby
give reasonable notice of the specific charges against
him, whereby he may properly prepare his defense,
or to safeguard himself against a second prosecu-
tion for the same offense, in that it cannot be
ascertained therefrom:

1. That there was any fraudulent purpose of the defendant in making the alleged statements of citizenship mentioned in said counts.

2. How or in what manner alleged representation of citizenship was fraudulent.

3. In that it cannot be ascertained whether any of the said persons mentioned in said counts, as the persons to whom the alleged false representation was made, (a) was one to whom the defendant was obligated to truthfully state the fact of citizenship, or (b) that any of such persons had a [4] legal right to inquire into or an adequate legal reason for ascertaining the citizenship of the defendant.

4. That the descriptive allegation, "said, being a person having good reason to inquire into the nationality status of the defendant," is insufficient at law, in that "good reason" (a) constitutes a conclusion, (b) of itself, fails to show a concomitant obligation to truthfully answer, (c) is ambiguous and uncertain, i.e. may be personal, arbitrary or statistical as distinguished from a legal reason which carries the counter legal obligation of a truthful answer, and (d) in itself may constitute a purely idle reason (although to them for their purposes a good reason), i.e. Gallup poll for statistical purposes, curiosity, etc.

Those were the grounds to the previous indictment and those are the grounds which we adopt to the substitute for Count 2, now indictment No. 20,604. I will submit it without argument.

Mr. Tolin: The government will adopt the brief which it has filed in opposition to a like motion in

Case No. 20,069, and direct the court's attention to the fact that the motion was denied when it was made in that case.

The Court: The motion is denied. You may proceed with the arraignment and plea.

The Clerk: This is in No. 20,604, Criminal, United States vs. Aaron Smehoff. Aaron Smehoff, is that your true [5] name?

The Defendant: No. My true name is Allen Smiley.

The Clerk: S-m-i-l-e-y?

The Defendant: That is right.

The Clerk: Mr. Christensen, do you have a copy of the indictment? If not, here is a copy.

Mr. Christensen: Yes; I have one.

The Clerk: Allen Smiley, you are advised that an indictment has been filed in this court charging you with a violation of the laws of the United States.

Mr. Christensen: We will waive reading of the indictment.

The Clerk: Have you advised him of his rights?

Mr. Christensen: Yes.

The Clerk: Do you want this copy?

Mr. Tolin: Mr. Christensen has already received the two of them.

The Court: Have you a copy of the indictment?

Mr. Christensen: Yes; I have, your Honor.

The Clerk: Is the defendant ready to plead?

The Defendant: Yes.

The Clerk: Do you waive the reading of the charges?

Mr. Christensen: We waive the reading.

The Clerk: Allen Smiley, what is your plea to the indictment? Are you guilty or not guilty? [6]

The Defendant: Not guilty.

The Court: Are these two indictments to be tried together? Is there a stipulation in the record?

Mr. Christensen: I think under the law they would properly be consolidated.

The Court: If they haven't been, there should be some order at this time.

Mr. Tolin: I move that such an order be made.

The Court: Is there any objection?

Mr. Christensen: No objection.

The Court: Very well. The two indictments shall be tried together. What is the estimate of the trial time? We have had a preliminary estimate, which was made in some other court. I would like to know from you gentlemen, first, what time will be required in the trial of this case, as closely as you can guess.

Mr. Tolin: That is something that is speculation, your Honor. We have tried these cases in less than an hour and sometimes they take longer. I thought three days would cover this one and allow ample time.

Mr. Christensen: I made an estimate originally that it would probably take ten days but, after reviewing the situation, I would say somewhere between three to six days, and that depends entirely on what policy I will adopt upon the trial. [7]

The Court: That creates a situation in this court that will make it impossible for the case to be tried at this time. We are behind in our calendar

some two or three weeks, I think, of short cases of people who are in jail awaiting trial.

Mr. Tolin: If the court please, may I inform the court that this case to which the indictment applies, which we are to try, was returned on the 18th of May, 1948, and the new indictment, which was returned on the 23rd day of March, is merely a restatement of one of those old counts. The case is not, therefore, a new one before the court. While we appreciate, of course, the difficulty that has arisen here, as I understand, that there are two judges of the court ill and that your Honor is having difficulty in assigning cases out for trial, however, the government considers this case one of major importance on this calendar. We have been specifically directed by the Attorney General's office to prosecute it with all possible proper speed. So we are ready and we trust, if your Honor does find it impossible to try the case today, that it will not be continued very long in the future. We also have many witnesses here.

Mr. Christensen: The status of the matter as far as a continuance is concerned is this. I think there were three or four indictments and arguments and, finally, it led up to indictment 20,069 and a demurrer was sustained to the fourth [8] count. Then that subject matter was the subject of a new indictment. The government elected to try that last indictment first. In other words, it was their judgment that that was their best case. That was set, your Honor, as quickly as possible after that and was tried last October. This case we are speaking

of, 20,069, did not get on the calendar until February. It was set for some day in April. At that time I asked for a continuance because I was actively engaged in trial, and then it was continued to this date by Judge Mathes. So there is just the one continuance.

Mr. Tolin: Of course, in the interval the Court of Appeals for the Ninth Circuit, in a case that it decided last December, has removed many of the issues which were argued in the motions to dismiss and came to the same conclusion in a similar case that Judge Beaumont came to when he declined to dismiss this one. I think that will simplify and shorten the issues for trial.

The Court: This is just an illustration of what is going to happen in the case. You gentlemen have different viewpoints, and I don't doubt for a moment that it will not take less than five or six days if you are going to pursue the various points that you have had up for discussion in the case. If it is going to take that long, I can't try these cases. I wish I could try them all one after the other but it can't be done. Our policy is to try the short cases in this department [9] and the longer cases, that will take four days or over, go to another department.

We find ourselves in the position now where some of our regular judges, one or two of them, are incapacitated for the time being. We are going to have some help from other sources. One judge is coming in here in July. He will be here July 12th or 13th and either he or I will try this case, de-

pending on how the calendar is made up of other cases that are to be tried. By that time I hope to make up the backlog on these other cases. People who are in jail awaiting trial have the preference and should be tried first. That is the situation as it exists.

Mr. Tolin: I had a call from the Attorney General's office last week, in which the instruction was given to me to proceed if possible and that, if the defendant moved for a further continuance, to resist it. So the case is one of considerable interest in the Department of Justice. I don't think the date your Honor mentioned in July is too far away. However, we are ready today if we can possibly find a way to take care of it.

The Court: If I could take six days out for the trial of this case, I would be glad to go ahead but, as I have stated before, these other cases must be tried and I am trying to overcome my backlog on the shorter cases awaiting trial.

Mr. Christensen: What date in July, your Honor? [10]

The Court: I will agree that this case should be tried as other cases should be tried, expeditiously. I would say on July 12th.

Mr. Christensen: That is satisfactory to me.

Mr. Tolin: Does the defendant personally consent to that?

The Defendant: Yes.

Mr. Christiansen: I am agreeable.

The Court: As I stated, the case will be tried here or by one of the outside judges.

Mr. Christensen: Yes, sir.

The Court: And you approximate the time as about six days, do you?

Mr. Christensen: Yes; I would approximate the examination about six days and I will try to shorten it if possible.

The Court: Our experience here is that these 2- or 3-day cases usually drag out to six days or more.

Mr. Christensen: May I now associate Mr. Robert Neeb in this case also as an attorney of record?

The Court: His name may be entered as an associate. Is there bail on this new charge?

Mr. Tolin: I don't think there is any necessity for bail on the new charge, your Honor. There has been bail on the old charge and the defendant has always been present and is present now. [11]

The Court: What is the bail now, if any?

Mr. Neeb: \$5000.

The Court: In which case was that deposited?

Mr. Tolin: That bail was actually in neither of these cases. It was in a companion case. A superceding indictment has been returned.

The Court: That case is still alive, is it?

Mr. Christensen: Yes.

Mr. Tolin: We kept that case alive in order that there would not be the necessity of a new bail. If we dismissed, it would require a bail in this case and I understand the bonding companies do not like to transfer from one case to another.

The Court: Are you satisfied to allow the bail to remain?

Mr. Tolin: Yes, your Honor; we are satisfied.

The Court: Very well.

The Clerk: The old case isn't on the calendar, is it?

Mr. Tolin: No.

The Court: If it is a live case, it should be on the calendar.

Mr. Tolin: May we refer to it as the old case now, informally, and I will bring the file in to the clerk so that he may enter it.

The Clerk: Do you mean you want it placed on the calendar [12] the same date as these are?

Mr. Tolin: Yes.

The Court: That isn't the case that has been consolidated, is it?

Mr. Tolin: No.

The Court: All of these cases are reset for July 12, at 10:00 o'clock. [13]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 22nd day of September, A.D., 1949.

/s/ ROSS REYNOLDS,
Official Reporter.

[Endorsed]: Filed Sept. 22, 1949.

In the District Court of the United States in and
for the Southern District of California, Central
Division

Honorable Dave W. Ling, Judge presiding.
No. 20069 Criminal

UNITED STATES OF AMERICA,
Plaintiff,
vs.

ALLEN SMILEY (charged as AARON SME-
HOFF),
Defendant.
No. 20604 Criminal

UNITED STATES OF AMERICA,
Plaintiff,
vs.

ALLEN SMILEY (charged as AARON SME-
HOFF),
Defendant.

REPORTERS' TRANSCRIPT OF
PROCEEDINGS

Tuesday, July 12, 1949, 10:00 a.m.

The Clerk: No. 20069 Criminal, United States
of America vs. Allen Smiley, charged as Aaron
Smehoff; No. 20604 Criminal, United States of
America vs. Allen Smiley, charged as Aaron Sme-
hoff; for consolidated jury trial.

Mr. Tolin: The government is ready.

Mr. Christensen: We are ready, your Honor,
with this statement that I direct attention to. I be-
lieve that was Indictment No. 20069?

The Court: That is the way it appears on this calendar.

Mr. Christensen: I direct your Honor's attention to Count 4. That count was dismissed on motion of the defense and an argument before Judge Beaumont, so it is not a part of the case.

The Court: That appears on the calendar, also.

The Clerk: Shall I call the jury, your Honor?

The Court: Yes.

(Whereupon a jury was duly impaneled and sworn.)

The Court: All jurors except those engaged in the trial of this case will remain in the courtroom. You will be notified in a few minutes when and where to return.

As far as the case now on trial, court will stand at recess until 2:00 o'clock. Keep in mind the admonition heretofore given you. [5*]

Mr. Kay was not in the jury box before our recess, at which time I admonished the jury. You understand that during the trial of the case you are not to discuss the case among yourselves, nor permit anyone to discuss it with you. You will also avoid forming or expressing any opinion upon any subject connected with it. I shan't tell you this each time we recess or adjourn, but you must bear it in mind throughout the course of the trial. That is all.

The Clerk: 2:00 p.m.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m. of the same day.) [6]

* Page numbering appearing at top of page of original Reporter's Transcript.

Tuesday, July 12, 1949, 2:00 p.m.

The Court: You may proceed, gentlemen.

Mr. Tolin: I will hand to Mr. Christensen for the defendant a copy of the trial memorandum, the original of which was delivered to the court's chambers during recess.

Shall I make an opening statement?

The Court: If you wish to.

Mr. Christensen: I may say, Mr. Tolin, that I have served my proposed instructions and the authorities upon which we rely are set forth in those instructions, which constitutes our trial memorandum for the present.

Mr. Tolin: I note the presence of the defendant. May it be stipulated that the jury is present?

Mr. Christensen: So stipulated.

Opening Statement on Behalf of the Plaintiff

Mr. Tolin: May it please the Court and members of the jury. It becomes my duty as government attorney in this case to make an opening statement, which is a bit more full than what I stated this morning as to the nature of the case, but still isn't the argument which you will hear at the close of the case. Nor is it evidence of any kind. What Mr. Christensen and Mr. Neeb and what I say to you, and what Mr. Hildreth, who is associated with me, might say to you, is of course argument or a statement. The evidence is that which [7] comes in in the form of documents which you will see or have read to you, and what comes from the mouths of the witnesses on the witness stand. But it is the

custom, and we hope a useful one, for the attorneys at the outset of the case to make an opening statement in order that you may more fully appreciate what the case is, and may aid you as to what to look for in the evidence.

As Mr. Christensen pointed out to you, we are trying three very narrow issues here. That is, the defendant is charged with just three offenses. They are very simple crimes. I will tell you briefly what they are.

I will first comment that it is the expectation of the government to prove each and every allegation of the two indictments.

The defendant, Allen Smiley, was born in Russia in the year 1907 or thereabouts. His family name was Smehoff, S-m-e-h-o-f-f, and the parents gave this defendant the name Aaron. I think it has been said somewhere in the record that Allen Smiley is the English form of Aaron Smehoff. Whether that is so or not, we don't care. I am just mentioning these two names to you because both names will appear in the evidence. They both relate to this man seated here at the end of the counsel table, who is the defendant on trial. [8]

After a time the Smehoff family moved away from Russia. They went to Canada. The defendant is here. He has never become a citizen of the United States nor ever received what are called first papers. He has remained at all times a citizen of some other country other than that of the United States.

In 1944 defendant Smiley was in the Los Angeles sheriff's office being booked.

I will remind you again he is not being tried here for anything except the claim that he was a citizen of the United States made at a time when he wasn't.

Count 1 relates to that time in 1944 when Officer J. E. Siu of the Los Angeles Sheriff's Department had Mr. Smiley in custody and undertook to book him and asked the usual identification questions, so they would know who they had to check back on the facts.

This defendant at that time told Deputy Sheriff Siu that he had lived in this country 18 years and this state 18 years and was born in New York and had lived in this country all his life, which added together spell out a statement that he was a citizen of the United States.

Mr. Christensen: Now, just a moment. That I object to, your Honor, because that is not actually the law on the proposition, that it spells that out. That is a question for your Honor to determine rather than counsel stating that it [9] does spell that out, so I must object to it.

The Court: All right.

Mr. Tolin: Then there came the carrying on through of that booking transaction, which was started by Mr. Siu, and another officer came into it and the overall questions: "Are you a citizen of the United States," and so forth, were then asked and he said, yes, that he was a citizen of the United States.

Time marched on to a day in 1945. The defendant was in the custody of officers of the Los Angeles City Police Department. They brought him in to the Los Angeles City Police Station to be booked.

Again he was asked the identification questions such as his height and weight and his age, and so on. And he said to those officers there at that time that he was a citizen of the United States; that he had been in the state of California for 20 years; that he had been in the United States 38 years and that he was 38 years of age.

Then he answered the other customary questions that are asked for the identification of people who are arrested. That is, he told about his education and made a statement concerning his marital status and other questions of that sort.

On that occasion, after he had told those things to the officers, it was typed up on a Los Angeles Police Department [10] identification report and he was given that report to sign and he did sign it, signing the name Allen Smiley and it was placed in the identification files of the records of the Los Angeles Police Department.

Then time went on to a day in 1947. In 1947 a man was murdered in Beverly Hills and this defendant was there at the scene of the crime.

I am not contending here that he had anything to do with the murder. I am not saying anything one way or the other on that but it is part of the background of this count.

The officers who went out to the house where Mr. Siegel lay dead brought Mr. Smiley into the Beverly Hills police station, as they would anyone there at such a place at such a time and under those circumstances. [11]

And the Beverly Hills Police Department undertook to book him. Officer Cox of that department, now employed in a bank here, but then the booking officer at the Beverly Hills Police Station, asked Mr. Smiley the usual identification questions, and of course among them there came the questions about the duration of his time in the country, and he gave that statement which was to the effect that he had been here all his life. And what was his nationality. And he said that he was an American. And that was entered up by the officer.

We must prove in this case that those statements were made. And as to any one count which we don't prove, that count fails.

We must prove that they were wilfully made; that is, that they were consciously made, he knowing that he was making them, and there wasn't any unconsciousness connected with his statement. That is, that it was a full and open statement made with the intention of making it, with the intention of making it as it was made.

Mr. Smiley, we will show you, was not under any misapprehension. He didn't believe he was a citizen of the United States. He knew very well he wasn't.

Of course you can appreciate, sitting here in a jury box in Los Angeles, that it would be most difficult to get the records from the little town in Russia here for you, so I [12] won't undertake to do that. But during the war years we had a law in the United States that every person residing in the United States who was not a citizen thereof was required to go to the Immigration and Naturalization Service and register as an alien, stating what country he was a citizen of. That had to be done within a certain period of time, shortly after the commencement of hostilities. Mr. Smiley didn't get there until long after it should have been done, but he did get there and did make the statement. We will have that statement in evidence, a statement signed by this defendant, and in it he says he was born in Russia. Also, in it he says that he is a citizen either of Russia or of Canada. If you believe that he did go down there and make that statement, and did register as an alien, we contend it will establish that he was an alien as of that time. But he went down there and made that statement before he committed these crimes. That is to say, before he told Officer Cox at the Beverly Hills Police Station, on the occasion of the investigation of the murder, and before he told the officer in the county jail, and before he signed the statement in the city jail, before those things were done he went down to the Immigration Service. So to counter the outside possibility that maybe he had become naturalized in the interval between the time he registered

as an alien, and the time that he went about saying that he was a citizen, we will produce the [13] officers of the Naturalization Service who will tell you that a search of the records of those persons naturalized in the district where this defendant's application for naturalization would be heard, had he ever made one, a search of those records doesn't show that he was ever naturalized.

Then as an excess of caution I will introduce a certificate from the Director of the Naturalization Service for the entire United States, and that will show that this defendant was never naturalized.

That brings the case down to these simple elements: When arrested in 1944 and asked by the——

Mr. Christensen: Now, if your Honor please, he stated what his proofs are, so it looks as if it is going to be argument from here on out, so it has now served the function of an opening statement of what he intends to prove.

Mr. Tolin: Mr. Christensen, you objected that I was too brief this morning; now I am too prolix. I will give up and sit down.

Mr. Christensen: I want to ask one question that I am very much concerned about. You forgot to mention whether or not you were going to call Mr. Hamilton from the Immigration Department, and that is one thing we had a stipulation on.

Mr. Tolin: No, I don't expect to call him, but pursuant to my understanding with you he is here.

Mr. Christensen: That is fine. [14]

Mr. Tolin: He is here. I think that anything

he can say is outside the scope of this case, but he is here if you want him, and I will ask him to stay throughout the trial.

Mr. Christensen: I think there was a record that he did testify as to citizenship before Mr. Hamilton, and that is why I provoke that thought.

Mr. Tolin: Let me know what you want.

The Court: There is a thing I noticed in the record that I would like to inquire about here. There was a statement there that he would be arraigned upon the date of trial. Has he ever been arraigned?

The Clerk: He has been arraigned.

Mr. Tolin: That matter has been disposed of and he was arraigned at that time.

Is that correct, Mr. Christensen?

Mr. Christensen: Yes.

The Court: Do you wish to make a statement?

Mr. Christensen: No, your Honor. We will reserve our opening statement.

The Court: Call your first witness.

Mr. Neeb: Your Honor, before any witness is called, I would move that we have all witnesses excluded, other than perhaps an officer that may be assisting Mr. Tolin. I don't know who that might be.

Mr. Tolin: Mr. Logan Lane of the FBI, and Mr. Kidder [15] of the Immigration and Naturalization Service are here from those two agencies assisting me. The other officers are merely witnesses

from agencies that are not directly assisting in the case.

I don't think this is the type of case, though, your Honor, where witnesses are going to be almost entirely peace officers and testify regarding booking transactions, that it is the sort of case in which witnesses are ordinarily excluded. I think it makes for some inconvenience to exclude them.

The Court: Why would it? There is a witness room out here that they can occupy.

Mr. Tolin: If the court thinks they should be, I am not objecting, particularly.

The Court: I think so. I don't know anything about it, but upon that request they will be. Call the names of them.

Mr. Tolin: Does the court wish me to call the names of the witnesses?

The Court: Yes.

Mr. Tolin: Mr. J. E. Siu, Mr. Dunn, Bill Hamilton. He is the one you want?

Mr. Christensen: I thought you were going to have him, too.

Mr. Tolin: I don't need him. Mr. Ray Griffin, Mr. Cox, Mr. R. B. Becker, Lt. H. F. Cunningham, or the officer [16] whom he has sent with records, Miss Pearl Harrison, Orville E. Harper, Milton S. Hopkins, Elmer V. Jackson, Martin L. McIntire, Rudolph Wellpott, M. W. Zeno, Lillian Hoover, and I think Mrs. Hoover gave me the name of another party this morning that I don't recall. Mrs. Harrison.

So far as I know, those are the specific witnesses. There may be other people who have been sent by the Sheriff of this County, the Police Department of this City, or the Police Department of Beverly Hills, or by the Immigration Service, and whose names I don't know, but who have come in here in response to the request that they bring records.

The Court: Who do you want excepted from the operation of the rule?

Mr. Tolin: I would like to have Mr. Logan Lane of the FBI and Mr. Marshall Kidder of the Immigration Service.

Mr. Christensen: No objection.

The Court: All right. The other witnesses will retire to the witness room. [17]

Mr. Tolin: I think it will perhaps expedite the handling of these exhibits as well as making them available to all counsel if I have them all marked for identification now, if the court doesn't object to it.

The Court: Very well.

Mr. Tolin: I ask that there be marked for identification a document headed "Application for Registry of an Alien."

The Clerk: Plaintiff's Exhibit 1 for Identification.

(The document referred to was marked Plaintiff's Exhibit No. 1 for Identification.)

Mr. Tolin: I ask there be marked for identification a document headed "Alien Registration Form."

The Clerk: Plaintiff's Exhibit 2 for Identification.

(The document referred to was marked Plaintiff's Exhibit No. 2 for Identification.)

Mr. Tolin: I ask that there be marked for identification a document dated June 3, 1949, entitled "Certificate of Non-Existence of Naturalization Record."

The Clerk: Plaintiff's Exhibit 3 for Identification.

(The document referred to was marked Plaintiff's Exhibit No. 3 for Identification.)

Mr. Tolin: I ask that there be marked for identification a document headed "Sheriff's Department, Los Angeles County, Record of Arrest."

The Clerk: Plaintiff's Exhibit 4 for Identification. [18]

(The document referred to was marked Plaintiff's Exhibit No. 4 for Identification.)

Mr. Tolin: Some of these excluded witnesses have some of the original documents, but I have a photostat, so may this photostat headed "Booking Slip, Los Angeles County Jail," be offered for Identification?

The Clerk: Plaintiff's Exhibit 5 for Identification.

(The document referred to was marked Plaintiff's Exhibit No. 5 for Identification.)

Mr. Tolin: I offer for Identification a file clipped together with the certification of the district director, Immigration and Naturalization

Service. The file is headed "Immigration and Naturalization File."

The Clerk: Plaintiff's Exhibit 6 for Identification.

(The document referred to was marked Plaintiff's Exhibit No. 6 for Identification.)

Mr. Tolin: I offer for identification a photostat marked "Beverly Hills Department of Police Arrest Report."

The Clerk: Plaintiff's Exhibit 7 for Identification.

(The document referred to was marked Plaintiff's Exhibit No. 7 for Identification.)

Mr. Tolin: I offer for Identification a document headed "Apartment Lease."

The Clerk: Plaintiff's Exhibit 8 for Identification. [19]

(The document referred to was marked Plaintiff's Exhibit No. 8 for Identification.)

Mr. Tolin: There are others that I don't have immediately. Will it be all right, Mr. Christensen, if I offer some of these not-so-clear photostats and substitute the good ones when they come in?

Mr. Christensen: That is all right. No objection.

Mr. Tolin: Los Angeles Police Department Identification Report.

The Clerk: Plaintiff's Exhibit No. 9 for Identification.

(The document referred to was marked Plaintiff's Exhibit No. 9 for Identification.)

Mr. Tolin: Los Angeles Police Department File Copy of Fingerprint Record.

The Clerk: Plaintiff's Exhibit 10 for Identification.

(The document referred to was marked Plaintiff's Exhibit No. 10 for Identification.)

Mr. Tolin: I will call as a witness Lillian May Hoover.

LILLIAN MAY HOOVER

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Lillian May Hoover. [20]

Direct Examination

By Mr. Tolin:

Q. Mrs. Hoover, where do you live?

A. At Sunset Plaza, 1220 Sunset Plaza Drive.

Q. Is that an apartment house?

A. Yes, it is.

Q. And the address that you gave is in what city? A. Los Angeles.

Q. Los Angeles, California? A. Yes.

Q. Do you have some connection with that apartment house other than just living there?

A. I own it.

Q. You are the owner of it? A. Yes.

Q. Do you know the defendant Allen Smiley who is seated here at the end of the counsel table?

A. Yes, I do.

Q. Did you ever seen him about that apartment house? A. Yes, I have.

(Testimony of Lillian May Hoover.)

Q. Is he a tenant there? A. Yes.

Q. Do you know how long he has been a tenant?

A. Since '44, I think.

Q. Placed on the little table before you is a document [21] that appears to be a lease. Will you examine it, please? A. Yes.

Q. Is that a lease of one of the apartments in the address which you have just given?

A. Yes.

Q. And is that the lease of the apartment occupied by Mr. Smiley? A. Yes.

Q. Have you seen him in and around and in use of that apartment between the date that that lease bears and the present time? A. Yes.

Q. He has been a resident there during that time? A. Yes.

Mr. Tolin: I offer in evidence Exhibit 8 for Identification, which is the lease.

Mr. Christensen: Your Honor, may I suggest that perhaps we withhold the offering of this exhibit at this time and then offer them all at the conclusion and then we can make our objections, if any?

That perhaps will facilitate the trial as well as dealing with them as a group rather than singly.

The Court: Do you have any objection to this exhibit?

Mr. Christensen: Well, other than as to materiality and relevancy as far as this trial is concerned. I still [22] can't see where it is relevant

(Testimony of Lillian May Hoover.)

or material. It may become so later on but at the moment I can't see it.

Mr. Tolin: Then I will state it. I have called this witness somewhat out of order because I understand either she or the lady with her isn't well and they wanted to get away.

I am offering it to show his place of residence in order to lay the foundation for the record of non-naturalization, because a man applies for and receives naturalization in the district wherein he is a resident.

Mr. Christensen: Mr. Tolin, I have not the slightest objection in calling this witness or any other witness out of order, but wouldn't it be expedient when you may be calling them out of order to simply reserve the actual offer and put on your testimony and they can all go in at one time?

Mr. Tolin: I think the relevancy is apparent and I will stand on my offer.

The Court: The exhibit may be received.

Mr' Christensen: No objection.

(The document referred to was marked Plaintiff's Exhibit No. 8 and received in evidence.)

Mr. Tolin: I have completed the direct examination of this witness.

Cross-Examination

By Mr. Christensen:

Q. Mrs. Hoover, I will ask you just where this

(Testimony of Lillian May Hoover.)

apartment [23] house of yours is located. Is it in the city of Los Angeles or Beverly Hills?

A. It is 1220 Sunset Plaza Drive.

Q. And is that in Los Angeles or Beverly Hills?

A. It is in Los Angeles.

Q. Bordering on Beverly Hills?

A. I beg your pardon?

Q. Bordering on Beverly Hills?

A. The water is from Beverly Hills?

Q. I say it is bordering on Beverly Hills.

A. Yes, it is.

Q. And how big an apartment building is it?

A. Twenty-five apartments.

Q. And you have owned it how long?

A. We built in in '37.

Q. 1937. And Mr. Smiley, you say, has been a resident there since June 6, 1944? A. Yes.

Q. Has he been absent during any periods of time since June 1944? A. I do not know.

Q. Have you yourself been there constantly since June 6, 1944 or have you gone away on any extended trips? A. I have been away on extended trips.

Q. You have? [24]

A. Yes.

Q. For what periods?

A. I was away four years ago in June for six weeks. I was away the year previous to that for three months and I was—each year I have been away for perhaps six weeks, a month to six weeks or three months—two and three months.

(Testimony of Lillian May Hoover.)

Q. But intermittently during the existence of this lease Mr. Smiley has been a resident at this apartment of yours? A. Yes.

Q. That is an exclusive apartment, is it not?

A. It is.

Q. In fact, the very apartment that he occupied was the one that was previously occupied by Lana Turner, isn't that correct? A. Yes.

Mr. Tolin: I object to that as irrelevant and immaterial.

The Court: Yes; I will sustain the objection.

Q. (By Mr. Christensen): The persons who are tenants of yours are all highly respectable individuals?

Mr. Tolin: Objected to as irrelevant and immaterial.

The Court: And probably calls for a conclusion of the witness.

Mr. Tolin: I will object on that ground, too.

The Court: The objection will be sustained.

Mr. Christensen: That is all.

Mr. Tolin: May the witness be excused?

The Court: Yes.

Mr. Tolin: I will call Mr. Griffin.

RAY E. GRIFFIN

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Ray E. Griffin.

(Testimony of Ray E. Griffin.)

Direct Examination

By Mr. Tolin:

Q. Mr. Griffin, what is your business or occupation?

A. I am with the Immigration and Naturalization Service.

Q. Of the United States? A. Yes, sir.

Q. How long have you been so employed?

A. Approximately 24 years.

Q. Do you have any special position there?

A. Yes. I am chief of the Nationality and Status Section.

Q. What is the general work of that section?

A. We have to do with the naturalization of aliens in this area, immediate area mainly. [26]

Q. Who is Henry Colarelli?

A. He is one of the officials of our service in our central office in Washington. I don't know his official title offhand.

Q. I show you a document which is marked Exhibit 3 for identification.

Is that some kind of an official document issued by the Immigration and Naturalization Service?

A. Yes, it is.

Q. What is it?

Mr. Christensen: I think it speaks for itself, doesn't it?

The Court: Go ahead.

The Witness: It is a certification signed by Mr. L. Paul Winning, General Counsel of the Immi-

(Testimony of Ray E. Griffin.)

gration and Naturalization Service as to the non-existence of a naturalization record. I haven't read this before.

Q. (By Mr. Tolin): I am just asking you as to the title of the document.

A. That is what it is.

Q. Now, Mr. Griffin, do you have something to do with the records of persons who are naturalized—that is, become citizens of the United States by the naturalization process? A. Yes.

Q. Within some particular district? [27]

A. Yes, sir.

Q. And what district is it that you are concerned with in your work?

A. That is the district which comprises the southern portion of the State of California, two counties in Arizona and one in Nevada with headquarters in Los Angeles. [28]

Q. What counties in Nevada?

A. The one of which Las Vegas is the county seat. I have forgotten what the county is now.

Q. Would it include the City of Las Vegas?

A. Yes. Las Vegas is the county seat.

Q. And the county of which Las Vegas is the county seat? A. Yes.

Q. And it would include one other county?

A. Not in Nevada, no.

Q. Would it include all of Los Angeles, Hollywood, and Beverly Hills? A. Yes.

Q. In fact, everything in Southern California?

(Testimony of Ray E. Griffin.)

A. That is correct.

Q. What do you mean by "Southern California"? What is the dividing line?

A. The line—the northern boundary is along the Counties of San Luis Obispo and Kern, a line extending across the state, that being the northern boundary.

Q. Would it include that address known as 1220 Sunset Plaza Drive, Hollywood, California?

A. Yes, sir.

Q. Do you have in your office a record of persons who have achieved citizenship in the United States by the [29] naturalization process within that area? A. We do.

Q. Have you examined it to determine whether one Aaron Smehoff or one Allen Smiley has been naturalized? A. Yes, sir.

Q. Have they, according to those records?

A. We could find no record under either of those names.

Mr. Tolin: I have concluded the direct examination of Mr. Griffin.

Mr. Christensen: No cross-examination.

Mr. Tolin: I offer Exhibit 3 for identification in evidence.

The Court: It may be admitted.

The Clerk: Exhibit 3 admitted in evidence.

(The document referred to was marked Plaintiff's Exhibit No. 3 and was received in evidence.)

(Witness excused.)

Mr. Tolin: I call Mr. Siu, J. E. Siu.

Mr. Hildreth, would you mind going to the witness room and getting the original document of which Exhibit 5 is a photostat?

Mr. Christensen: You can use that and substitute the other one later, as far as I am concerned.

Mr. Tolin: Thank you. [30]

JACOB E. SIU

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Jacob E. Siu.

Direct Examination

By Mr. Tolin:

Q. Mr. Siu, what is your business?

A. Deputy sheriff, Los Angeles County.

Q. How long have you been so employed?

A. Seven years.

Q. Do you know the defendant, Allen Smiley?

A. I do.

Q. Under what name do you know him?

A. Allen Smiley.

Q. Did you have occasion to be present at a time when Allen Smiley was in custody of the Los Angeles County Sheriff's office? A. Yes.

Q. When was that?

A. May, approximately the 25th, 1944.

Q. Where?

(Testimony of Jacob E. Siu.)

A. I first met him at the Sunset Towers on Sunset Boulevard.

Q. And after you met him at the Sunset Towers did you [31] proceed to some other place with him?

A. I placed him under arrest first and then took him to our office located at 414½ North Hill Street in Los Angeles.

Q. When you arrived at your office did you book him upon some charge.

A. Yes, I booked him on 836-3 of 337-A.

Q. When you book a man what happens? Tell the jury generally what is meant by booking.

A. We have an arrest slip and it states the name, middle name and last name. I write that down in my own handwriting. The address where he lives, and where he is arrested at. The date of arrest, color of his hair, color of his eyes, his weight and height. And the next line says, "Previous arrests." The answer was "Yes."

Mr. Christensen: Now, just a moment. I move to strike that out, if the Court please. He is asking for a general description of a routine of booking, rather than as to a specific booking.

Q. (By Mr. Tolin): Yes, Mr. Siu, what we want here is what is meant by "booking."

A. Booking is getting the information down on paper before we take them to the County Jail.

Q. Then the prisoner is taken to the jail, is he?

A. Yes.

(Testimony of Jacob E. Siu.)

Q. And that information that you take down on paper, [32] what happens to it?

A. Well, that goes to the booking office and that is copied on another piece of paper, I think it is triplicate.

Q. Do you know the purpose of the Sheriff's office in taking that information?

A. For a matter of record, identification.

Q. You have in your hand Exhibit 4, for identification, don't you? A. Yes.

Q. Do you recognize that as a document that you used in connection with the booking of Allen Smiley?

A. Yes, this is the arrest slip that I made out.

Q. Where did you get the information that you put on there? A. By asking Mr. Smiley.

Q. By Mr. Smiley, do you mean the defendant?

A. The defendant, yes.

Q. Did you ask him all the questions as to which there are answers on there? A. Yes.

Q. Who gave you the answers?

A. Mr. Smiley.

Q. I will direct your attention particularly to the questions regarding length of time in the United States. Is there a question there about that? [33]

A. It says, "Years lived in county." The answer is, "18 years." "In the state?" "18 years." "In U. S." "Life."

Q. Did he tell you his age?

(Testimony of Jacob E. Siu.)

A. The age was 37.

Q. Where did you get that information?

A. He told me.

Q. Did he give you all that information that you have now recited about the answers?

A. Yes, sir.

Q. Then, after you got that information, did you write it down yourself? A. Yes, sir.

Q. Now, there is Exhibit 5 before you. Is that Exhibit 5 part of the booking procedure record?

Mr. Christensen: That is still for identification, so we don't mix the record up. That is the only reason why I interrupt.

Mr. Tolin: Yes.

The Witness: This was made out in the County Jail.

Q. (By Mr. Tolin): Well, the question is, is it part of the booking record of Mr. Smiley on the occasion of that same arrest?

A. Yes, it is.

Q. Do you recognize it as an official document of the Sheriff's department kept by it in the regular course of [34] business? A. Yes.

Mr. Neeb: I object to this. Unless this man is the one that keeps those particular records, it would be hearsay on his part. He has not been qualified as to what records the county keeps, except that he makes the booking himself.

Q. (By Mr. Tolin): Do you know, Mr. Siu?

A. I signed this booking.

(Testimony of Jacob E. Siu.)

Q. You signed it? A. Yes.

Q. And is it a record that is required to be kept in connection with the booking of a prisoner under the circumstances that prevailed when Mr. Smiley was booked?

A. Yes, it is kept by the County Jail booking office.

Q. Did Mr. Smiley give you the answers to any of the questions that appear on Exhibit 5, for identification?

A. Well, the top part of this, where my signature is, is the same information that is on the arrest slip.

Q. As to the part below your signature, did you have anything to do with that?

A. No, I didn't make that out.

Q. Was it made out at the time that the prisoner was in your custody? A. Yes, it was.

Q. Was it part of the same booking transaction? [35] A. Yes, it was.

Q. Do you know who made it out?

A. The clerk up in the County Jail. I don't know his name.

Q. Did the defendant Smiley give the information?

A. No. He took it off the arrest slip.

Q. Did you have any other conversation with the defendant Smiley in the course of either the arrest or the transit to the jail, or your interviews

(Testimony of Jacob E. Siu.)

with him in connection with the alleged offense, concerning his citizenship?

A. No other conversation other than what I asked him when I made out the arrest slip.

Mr. Tolin: I have concluded the direct examination.

Mr. Christensen: May I see the record?

Mr. Tolin: Counsel desired to see what the witness had been looking at, so I will hand to Mr. Christensen and Mr. Neeb Exhibits 4 and 5, for identification.

Cross-Examination

By Mr. Christensen:

Q. Mr. Siu, directing your attention now to Exhibit 4 for identification, that is the slip that you had in your hand, was it not, and what you have been testifying from? A. Yes.

Q. As I understand your testimony, you made this slip out yourself, is that right? Is that in your handwriting? [36]

A. That is my handwriting, yes.

Q. You say you were present at the time that Mr. Smiley was arrested?

A. Yes, he was standing on the other side of the counter when I asked him those questions.

Q. You took him, did you, from this address, 8358 Sunset Boulevard, to where?

A. 4141½ North Hill Street. That is our Vice Squad office. Took him there to ask him questions before we book him in the County Jail.

(Testimony of Jacob E. Siu.)

Q. In other words, you took him there and interrogated him? A. Yes.

Q. You interrogated him there? A. Yes.

Q. Any other officers present at the time?

A. At the time of the booking?

Q. At the time of your arresting him at this Sunset address. A. Yes.

Mr. Tolin: Pardon me. I think some of the jurors are indicating difficulty in hearing.

Mr. Christensen: Very well, I will talk a little louder, ladies and gentlemen.

Q. (By Mr. Christensen): Were there other officers [37] present at the time you made this arrest on Sunset Boulevard?

A. Yes. Captain Deal, Acting Lieutenant Manning, myself, Deputy Kapic, and Schaffer.

Q. So you six officers then took him down to this address at 444 Hill Street?

A. Five of us made the arrest.

Q. At that point there were these officers also present? A. Well, we booked——

Q. I am asking you if these five officers were also present at that time?

A. Making the slip out?

Q. Yes.

A. There was one other, I forget which one it was now, the one—Siegel.

Mr. Tolin: Mr. Christensen, one of the jurors says he can't hear.

A Juror: The witness. Not the attorney.

(Testimony of Jacob E. Siu.)

Q. (By Mr. Christensen): Let me ask you this question, then. Talk a little louder, Mr. Siu.

Mr. Tolin: Pardon me. Before you do that, could we have the reporter read back the last few questions and answers?

Mr. Christensen: Very well.

The Court: All right. Go ahead.

(The record was read by the reporter.) [38]

Mr. Christensen: Shall I continue, your Honor, or do you recess in the afternoon at 3:00 o'clock.

The Court: You may finish with this witness.

Mr. Christensen: Very well.

Q. Now, you say there were all of these officers present interrogating Mr. Smiley at this address on Hill Street, is that correct, Mr. Siu?

A. That is right.

Q. And how long did you interrogate him?

A. Oh, I imagine about a half hour.

Q. All of you officers were present at the time?

A. Most of the time.

Q. And was he locked up at that time?

A. No.

Q. Then you at that time in the presence of these officers booked him?

A. I think it was Schafer or Kopic (phonetic) that booked Benjamin Siegel.

Q. I didn't ask you that question.

I move that be stricken, your Honor.

The Court: It may be stricken.

(Testimony of Jacob E. Siu.)

Q. (By Mr. Christensen): I am asking about Mr. Smiley. A. Yes.

Q. He was arrested, I see here you mention 836-3. That is supposed to be a gambling charge, is it not? [39]

A. Suspicion of bookmaking.

Q. And had you known Mr. Smiley before?

A. No. Never saw him in my life.

Q. This was back in 1944? A. Yes.

Q. You book a great many people, don't you, during the course of a year?

A. That is right.

Q. Do you remember booking anyone else on this particular day? A. Benjamin Siegel.

Q. Aside from him whom else did you book?

A. No others.

Q. And your recollection feeds back, does it, to that time, that is, that it was this Mr. Smiley that you asked questions of, is that right?

A. Yes, sir.

Q. Do you know who you booked the next day?

A. No, I don't.

Q. This is in your handwriting, you say?

A. Yes, sir.

Q. Now, you have booked hundreds of people, haven't you? A. Yes, sir.

Q. And isn't it a fact that sometimes you don't get [40] the information solely and alone from the individuals that you book?

(Testimony of Jacob E. Siu.)

A. I put down what the answers are that they give me.

Q. Don't sometimes some of the other officers give you information and that goes on the booking slip? A. No.

Q. Don't you on occasions frequently find a recalcitrant citizen who refuses to answer questions of police officers? A. Yes.

Q. You have found that happen? A. Yes.

Q. And you still have to make a booking slip for identification purposes, don't you?

A. Yes, sir.

Q. And that is all this is for, is simply to identify the individual whom you have under arrest?

A. Yes.

Q. Now, there is no specific purpose beyond that for such booking slip?

Mr. Tolin: Objected to as calling for a conclusion of the witness.

Mr. Christensen: He already testified to that on direct examination.

The Court: I think so. [41]

The Witness: Do you want me to answer it?

Q. (By Mr. Christensen): Yes.

A. We make out a booking slip for identification and the charge that they are booked on.

Q. Well, in the event that Mr. Smiley had refused to answer these questions where would you then and how would you obtain the information that would identify him at that time?

(Testimony of Jacob E. Siu.)

Mr. Tolin: Objected to as irrelevant.

The Court: Yes. Objection is sustained.

Q. (By Mr. Christensen): Now, these are the only questions that you would ask him—these specific questions on this booking slip, Exhibit 4, is that correct? A. That is right.

Q. His age, his residence or his citizenship. That would all have to appear on this slip, Exhibit 4, as far as anything you asked him is concerned, is that right? A. Yes, sir.

Q. Then, directing your attention, Mr. Siu, to Exhibit 5 for identification, the photostatic copy, as I understand it, you had nothing to do with typing the information that appears on that exhibit, is that right?

A. This information in typewriter is written by a clerk and after it is made out I sign it. My signature is here.

Q. I see. [42]

Mr. Tolin: You are referring to Exhibit 5?

Mr. Christensen: Yes, Exhibit 5.

Q. So when a clerk at the County Jail booking office then made out this booking slip Exhibit 5 for identification, you then signed it?

A. That is right.

Q. You didn't interrogate then Mr. Smiley any further? A. No.

Mr. Christensen: That is all, your Honor.

Mr. Tolin: I offer Exhibit 4 in evidence.

(Testimony of Jacob E. Siu.)

The Court: It may be received.

(The document referred to was marked Plaintiff's Exhibit No. 4 and received in evidence.)

Mr. Christensen: If your Honor please, there is some information on that exhibit which if it goes before the jury——

The Court: I know what you are referring to. It probably should be deleted some way.

Mr. Christensen: Yes. We want to show the disposition of the matter but we don't want to try collateral issues.

The Court: I don't know how that can be accomplished.

Mr. Tolin: We are not trying that case.

The Court: I know, but it probably shouldn't be called to the attention of the jury either.

Mr. Tolin: It was counsel who brought it out. Of [43] course, it does show the right of the police department to inquire. Your Honor knows that a claim to citizenship, in order to ground a prosecution, has to be made under serious circumstances—that is, it is not a flippant statement in jest.

The Court: Let me see the document.

Mr. Christensen: I have much argument to offer on that subject but this perhaps is not the time to do so. I have a totally different view from what counsel just expressed on the subject.

Mr. Tolin: What I have expressed is the law

(Testimony of Jacob E. Siu.)

of the case and your motion to dismiss is on that basis.

Mr. Christensen: And that is the time when we will reach it.

The Court: I think it may be received.

We will have our afternoon recess at this time. The jury will keep in mind the court's admonition. That is all of this witness?

Mr. Tolin: That is all I have.

The Court: All right, you may be excused.

The court will stand at recess for five minutes.

(Recess.) [44]

Mr. Tolin: Call Mr. Becker.

RALPH W. BECKER

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Ralph W. Becker.

Mr. Tolin: We have been using a photostat of the Los Angeles County Jail booking slip. I now have in hand a duplicate original. May that be substituted in the record in lieu of the photostat?

Mr. Christensen: Yes.

The Clerk: That is Exhibit 5.

Direct Examination

By Mr. Tolin:

Q. Mr. Becker, I place before you Exhibit 5,

(Testimony of Ralph W. Becker.)

for identification. Will you tell us your occupation, please?

A. Deputy Sheriff of Los Angeles County. I am assigned——

Q. Go ahead.

A. ——assigned to the Records and Communications Division.

Q. What are your duties in that work?

A. Part of my duties is keeping records.

Q. Records of what?

A. Of the identification of persons booked in the Los [45] Angeles County Jail.

Q. You have before you Exhibit 5, for identification. Do you know what that is? A. I do.

Q. What is it?

A. It is a booking slip of the Los Angeles County Jail.

Q. Concerning whom?

A. The name appearing on the face is Allen Smiley.

Q. Is it an original record? A. It is.

Q. Is it kept by you in the ordinary and regular course of business of the Los Angeles County Sheriff's Office? A. It is.

Q. Is it required by the rules under which you work to be kept? A. Yes, sir.

Mr. Tolin: You may cross-examine.

Mr. Christensen: No cross-examination.

Mr. Tolin: Mr. Cunningham.

If the court please, may I pass Exhibit 4 to the jury?

(Testimony of Ralph W. Becker.)

Mr. Christensen: I think, your Honor, it might be well that that be reserved until the case is submitted, because there may be motions to strike. I have a motion that I shall make to certain phases of it, and I can't see any purpose at [46] this time, there are going to be so few exhibits, that it need go to the jury now in its entire form. There are those aspects that your Honor indicated might not be appropriate.

Mr. Tolin: I don't see any of those things written on this Exhibit 4, and it is in evidence. I think the jury is entitled to see it and learn the case as it goes along. The witness has testified fully concerning the exhibit.

Mr. Christensen: It is as to the extraneous and irrelevant matter that couldn't conceivably lend any aid at all to the character of the charge that we are confronted with here that I am directing myself to.

Mr. Tolin: If counsel will indicate what he considers extraneous matter that you would like covered, I am agreeable to having it covered up by the clerk.

Mr. Christensen: Very well. I will stand on my original proposition, that it is a sort of a piecemeal matter of passing an exhibit, because you don't get the full import or significance of an exhibit, and they can be integrated when they are all offered at one time.

The Court: They are introduced piecemeal.

(Testimony of Ralph W. Becker.)

Mr. Christensen: Sometimes the practice is to do it the other way, your Honor.

The Court: The jury may see this one.

Mr. Christensen: Very well, your Honor.

Mr. Tolin: I call Officer Cunningham. [47]

Witness Becker: Can I be excused?

The Court: Yes.

Mr. Tolin: I offer No. 5 in evidence.

Mr. Christensen: That is objected to, if your Honor please, as hearsay, and it fits the absolute pattern of the Prevos case in our own circuit on this kind of a document, and it was held in that case to be prejudicial error. There is no testimony at all that anything contained on that came from the lips of this defendant. Simply that it is a record that somebody wrote up based, in part at least, on the other exhibit. The only testimony is that down to a point of the signature line the previous witness Siu said that that was his signature, and the detail before that contains simply the charge, suspicion of bookmaking, the address, and the agency arresting him; then a title D. S. in the corner and a signature. Beyond that, the other witness Siu testified he had nothing to do with, and it is conclusions only in the latter portion of that exhibit.

Mr. Tolin: I am agreeable to arguing it at a later time.

Mr. Christensen: It isn't a case of arguing. It is a case of a prejudicial piece of evidence getting

in, and I say it is hearsay, and I object to it on that ground I recite, your Honor, the case of United States vs. Prevos.

The Court: We won't take time now. I will reserve ruling [48] on it. Go ahead.

Mr. Tolin: Mr. Cunningham.

FRANK H. CUNNINGHAM

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Frank H. Cunningham.

Mr. Tolin: We are going to bring in a better copy of Exhibit No. 9 for identification. Here it is. May it be substituted in lieu of the other?

Direct Examination

By Mr. Tolin:

Q. Mr. Cunningham, what is your occupation?

A. Police Officer of the City of Los Angeles.

Q. How long have you been so employed?

A. 12½ years.

Q. Are you attached to any particular detail or duty? A. I am.

Q. What is it?

A. Record and Identification Division.

Q. How long have you been attached to that detail?

A. The past two and a half years.

Q. Do you hold any particular position in that work? A. Assistant commander.

(Testimony of Frank H. Cunningham.)

Q. Are the records kept under your directions?

A. They are.

Q. You have before you Exhibit 9 for identification. What is that?

A. That is a photocopy of our form 5.5, the identification report.

Q. For what purpose is that identification report used in the work of your department?

A. As an adjunct to our fingerprint card furnishing additional information so that we can in the future identify a person. The information is indexed in various forms, the name, physical defects are indexed, and it is kept in the package and serves to identify the individual arrested connected with the Los Angeles number, which is the overall number of the subject.

Q. That Exhibit 9 that you are holding is a photostat. Did you prepare that photostat yourself?

A. I did.

Q. From what did you prepare it?

A. From the original of the 5.5.

Q. Which was a record of your office?

A. That's right.

Q. Was that record required to be kept in the usual and ordinary course of the business of the Police Department?

A. It was.

Q. Acted upon by the Police Department in its work? [50]

A. That's right.

Q. Was that record available to any other law enforcement agencies than the Los Angeles Police

(Testimony of Frank H. Cunningham.)

Department? A. Yes.

Mr. Christensen: I object to that. It is irrelevant and immaterial, your Honor.

The Court: I think he may answer.

The Witness: Our records are open to all bona fide law enforcement agencies.

Q. (By Mr. Tolin): Would that include the Immigration and Naturalization Service of the United States? A. Yes, sir, it does.

Q. Do you recognize that as a true photostat of the original? A. Yes, sir, I do.

Mr. Tolin: I offer it in evidence as Government's Exhibit 9.

Mr. Christensen: That, if your Honor please, is objected to, again, upon the ground that it is hearsay. Also, it is irrelevant and immaterial. The same objections as to the previous exhibit, No. 5.

Mr. Tolin: I will lay a further foundation, then, as to the signature, Mr. Christensen. Withdraw the offer at this time. You may cross-examine.

Mr. Christensen: I didn't see any signature on this at [51] all. It may be on the better copy. I see some handwriting down at the bottom now.

Mr. Tolin: On the good copy it shows right here (indicating).

May I pass the proposed exhibit to Mr. Christensen? He has a bad copy here.

If the court please, we are discussing here the

(Testimony of Frank H. Cunningham.)

appropriateness of covering certain portions of this exhibit.

You may cross-examine, Mr. Christensen.

Mr. Christensen: No cross-examination, your Honor.

The Court: All right. That is all.

Mr. Tolin: Mr. Harper.

ORVILLE E. HARPER

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Orville E. Harper.

Direct Examination

By Mr. Tolin:

Q. Mr. Harper, you are a police officer of the City of Los Angeles?

A. Not now, I am not.

Q. Were you such on the first day of November 1945? A. Yes, sir, I was.

Q. I show you Exhibit 9, which purports to be an identification [52] report.

Mr. Christensen: That is for identification, Mr. Tolin?

Mr. Tolin: Yes, Exhibit 9 for identification.

Q. And I show you also what I will ask be marked for identification as the next in order.

The Clerk: Exhibit 11, for identification.

(Testimony of Orville E. Harper.)

(The document referred to was marked Government's Exhibit No. 11 for identification.)

Mr. Christensen: Can I see it, please?

Mr. Tolin: Yes.

(Document handed to counsel.)

Q. (By Mr. Tolin): Looking at Exhibit 9, Mr. Harper, do you recall whether you had anything to do with the arrest of the subject that is mentioned thereon? A. Yes, sir.

Q. Did you make that arrest?

A. No, sir, I did not.

Q. What was your part in it? Were you a booking officer, or what?

A. Yes, sir, booking officer.

Q. Do you know Allen Smiley, seated here at counsel table?

A. I have saw him. I don't know him.

Q. Do you recall him as a man that you saw at some time that you had something to do with that Exhibit 9 for [53] identification?

A. Yes, sir, I do.

Q. When and where?

A. At the Lincoln Heights Jail.

Q. In Los Angeles? A. Yes. [54]

Q. When?

A. November 1st, approximately 3:00 o'clock in the morning, 1945.

Q. Mr. Harper, some of the jurors are having trouble hearing you.

(Testimony of Orville E. Harper.)

A. It was November 1st, 1945, at approximately 3:00 o'clock in the morning of that day.

Q. Now, at that time who was present besides the defendant Smiley?

A. Well, there was a number of them present. They booked a bunch of them on a gambling charge.

Q. Were there other officers present?

A. Yes, sir, there was.

Q. Did you prepare this Exhibit 9 or some part of it? A. Part of it, yes, sir.

Q. Do you recall what part you prepared?

A. The information that is on it.

Q. Where did you get the information that you inserted on it?

A. From the defendant when he was booked—at the time he was booked.

Q. Was he afterwards shown that Exhibit 9, and of course Exhibit 9 is a photostat, but was he shown the original of it?

A. Well, I don't know that part of it.

Q. Well, will you look at it? You will see there is [55] what appears to be a signature of Allen Smiley on it. Did this defendant sign that?

A. I couldn't say myself. I don't remember. It has been so long ago.

Q. Were you in charge of the booking operations at that time? A. No, sir, I was not.

Q. What was your part in it?

A. I was just the booking officer.

Q. What was the practice in the department as

(Testimony of Orville E. Harper.)

to the preparation of these identification statement?

A. Well, they asked the prisoner booked at the time he was booked the information that covers this and put it down just as it was told to them at the time from the person that was being booked.

Q. And was the prisoner then shown the document?

A. He has to sign it after it is made out.

Q. He was asked to sign it?

A. Yes, they all are.

Q. Do you have any recollection as to whether that was done in this particular case?

A. Well, I can't say in this particular case. It is the practice that they all do.

Q. You mean to say you have no independent recollection of it in this instance? [56]

A. No; I don't have any of them for that matter.

Mr. Tolin: You may cross-examine.

Cross-Examination

By Mr. Christensen:

Q. Mr. Harper, at the time of this booking that you have just referred to, how many other persons were there at that time?

A. I don't recall. Quite a number. Somewhere around 20 persons altogether.

Q. And am I to understand that you were the officer who booked all of these 20?

A. No, sir; only part of them.

Q. How many? A. Five, I think.

(Testimony of Orville E. Harper.)

Q. And where was it you booked them?

A. In the booking office at Lincoln Heights Jail, at the city jail, Los Angeles.

Q. And the whole 20 were in that booking office at that time? A. Yes, sir, they were.

Q. And you were then the booking officer on duty at Lincoln Heights? A. Yes, sir.

Q. Were there any other booking officers on duty at that time? [57]

A. Yes, sir, there were.

Q. Who were the other officers?

A. I don't recall their names, but there are always three of us present at the time.

Q. That is a pretty busy station, isn't it, Lincoln Heights? A. Very busy.

Q. Very busy? A. Yes.

Q. So busy that it requires three booking officers on each shift?

A. There are usually on each shift.

Q. Usually? A. (No answer.)

Q. And can you give us the names of any of the other five that you booked at that time?

A. No, sir, I can't.

Q. As a matter of fact, you don't even remember Mr. Smiley as being there at that time, do you?

A. Yes, I remember him.

Q. You remember him, do you? A. Yes.

Q. Did you ever see him before?

A. I seen his pictures before—not him.

Q. And were all 20 standing together at the

(Testimony of Orville E. Harper.)

counter [58] where you three booking officers were making the bookings?

A. No, sir. I don't recall how they were standing or anything.

Q. Pardon me?

A. I don't recall how they were standing or where they were standing, but there was approximately 20 persons in the booking office at the time, including officers.

Q. And did you type these yourselves?

A. These?

Q. Yes. A. Only the information.

Q. That is what I mean. You type the information? A. Yes.

Q. You have no independent recollection now, do you, of asking these questions and then these answers being given to you?

A. Well, not question for question, no, sir, I don't recall, but it is the practice that we have to do exactly what the person tells us.

Q. You have a practice of when somebody is brought in on a charge that you must make out an identification slip and that is called booking?

A. Yes.

Q. And you put a sheet in the typewriter and either you or somebody else asks the questions and you immediately [59] transmit that information to a piece of paper, is that right? A. Right.

Q. Do you recall in this instance whether you

(Testimony of Orville E. Harper.)

even asked Mr. Smiley or somebody else asked him the question at that time?

A. Well, it had to be me. No one else asks the questions. You ask them direct from the person being booked.

Q. Now, you have testified as to practice and that this is required by the police department, this identification report. What is your practice in the instance of a recalcitrant prisoner who refuses to answer these questions?

Mr. Tolin: Objected to as irrelevant.

Mr. Christensen: Your Honor, we have an element of duress that can be developed in this case.

The Court: Objection will be sustained.

Mr. Christensen: Well, may I reserve that and make an offer of proof later on, your Honor, out of the presence of the jury?

The Court: Yes.

Mr. Tolin: We will keep Mr. Harper available if you want to use him as your witness.

Mr. Christensen: Well, this is cross-examination. No further questions, your Honor.

Mr. Tolin: Have you given this an exhibit number?

The Clerk: Plaintiff's Exhibit 12 for identification. [60]

(The document referred to was marked Plaintiff's Exhibit No. 12 for identification.)

Redirect Examination

By Mr. Tolin:

(Testimony of Orville E. Harper.)

Q. Mr. Harper, you are not with the Los Angeles Police Department now? A. No, sir.

Q. And it has been some time since you have had occasion to see or work with these records, is it not? A. Some time, yes, sir.

Q. Mr. Harper, I show you Exhibit 12 for identification. Do you recognize the handwriting on that document? A. Yes, sir, I do.

Q. Whose handwriting is it?

A. It is my handwriting.

Q. Where did you get the information that you wrote out on Exhibit 12 for identification?

A. From the defendant Allen Smiley.

Q. There appears to be a question on here respecting birth and the answer is printed "Born in," and then the words written in "N. Y." Who gave you that information? A. Allen Smiley.

Q. Did you ask him for it?

A. Yes, sir, I did.

Q. Do you recall how you asked him? [61]

A. I asked him where he was born.

Q. And what did he answer?

A. New York.

Q. Now, does this refresh your recollection as to how the questions were asked and what questions were asked with respect to the preparation of Exhibit 9 for identification? A. Yes.

Q. And with your memory so refreshed can you now tell us how you got the answers that are typed

(Testimony of Orville E. Harper.)

in response to the printed questions upon Exhibit 9?

A. One was copied and the other was asked.

Mr. Christensen: I can't hear you.

The Witness: Some of it was copied from the booking slip and part of it was asked the individual.

Q. (By Mr. Tolin): You say part of it was copied from the booking slip and part of it was asked?

A. Yes, sir.

Q. Asked of whom? A. Allen Smiley.

Q. Now, directing your attention to that part of it which says "citizen," which is a printed word, and after the word "yes." Was that copied from something or was that asked?

A. That was asked.

Q. Asked of whom? [62]

A. Allen Smiley.

Q. By whom? A. By myself.

Q. And how did he answer that question?

A. "Yes."

Q. Directing your attention to that portion of Exhibit 9 for identification which refers to the age 38. Was that copied or was it asked?

A. Asked.

Q. Asked of whom? A. Allen Smiley.

Q. By you? A. Yes, sir.

Q. And was the answer "age 38" given by him?

A. Yes, sir.

Q. Referring to the printed question "time in country" and the typewritten answer "20 years," was that copied from something or was that asked?

A. That was asked too.

(Testimony of Orville E. Harper.)

Q. By whom? A. By me.

Q. Of whom? A. Allen Smiley.

Q. And who answered it?

A. Allen Smiley. [63]

Q. Is that the answer he gave you?

A. Yes, sir.

Q. Referring to that portion of Exhibit 9 for identification which is printed, the word "state" and the typed answer "20 years," was that asked or copied? A. That was asked.

Q. Asked of whom? A. Allen Smiley.

Q. By you? A. By me.

Q. And who answered? A. Allen Smiley.

Q. And where the printed portion is "U. S. A." and the typed portion "38 years," was that asked or copied? A. That was asked.

Q. Of whom? A. Allen Smiley.

Q. By you? A. By me.

Q. And who gave that answer?

A. Allen Smiley.

Q. Now, can you tell us what portion of this Exhibit 9 for identification was copied?

A. Yes, sir, I can.

Q. Will you tell us, please? [64]

A. The booking number in the right-hand corner at the top, the charge and the name and the address.

Q. There are two addresses. There is the address of the defendant and the location of the arrest. To which one are you referring?

(Testimony of Orville E. Harper.)

A. Location of arrest.

Q. The location of arrest was copied?

A. Yes.

Q. Does that constitute the portion that was copied?

A. Well, it looks like about all of it, yes, sir.

Q. Now, since we have gone over this more fully and you have had Exhibit 12 for identification before you, I will ask you is that your signature on there.

A. Yes, sir.

Q. Harper? A. Yes, it is.

Q. Do you now recall whether or not you saw the defendant Smiley sign that, meaning Exhibit 9 for identification?

A. I don't recall that part of it, of him signing it.

Q. So you don't know whether this is a real signature or a spurious signature?

A. I don't recall him signing it.

Q. It wasn't the custom, was it, to have other people sign for these men? [65]

A. No, sir, it wasn't.

Q. It was not? A. No.

Mr. Tolin: Do you want to recross?

Mr. Christensen: Well, I have a couple more questions.

Recross-Examination

By Mr. Christensen

Q. Now, as I understand it, Mr. Harper, on this Exhibit 9 you don't recall Mr. Smiley signing that in your presence?

A. No, sir, I don't recall that part of it.

(Testimony of Orville E. Harper.)

Q. But you are testifying that you do recall in his presence that you asked the questions appearing upon that exhibit? A. Yes, sir, I do.

Q. That you now have an independent recollection of it? A. I do. [66]

Q. You said something about this Exhibit 9 was required in the course of practice by the Police Department. Did somebody instruct you to make these bookings in this fashion?

A. No, sir. It isn't a practice, it is an order, departmental order.

Q. In other words, there is a department order saying that you should get these or try to get these from anyone who is arrested? A. Correct.

Q. So you are simply carrying out an order to try to get as much identification information as a prisoner will give you? A. Correct.

Q. Oftentimes they don't give you any?

A. Well, if he doesn't, he is held up until he does.

Mr. Christensen: That is all.

Redirect Examination

By Mr. Tolin:

Q. But if he does, you write it down, is that right? A. Yes.

Q. If he refuses to give you any, what kind of entry do you make?

A. If he refused to give any, we book him as John Doe, give him a booking number, and hold him until he does give the information. [67]

(Testimony of Orville E. Harper.)

Mr. Tolin: I couldn't hear the last part of it. May the reporter read it, please?

(The last answer was read by the reporter.)

Mr. Tolin: That is all.

Recross-Examination

By Mr. Christensen:

Q. By "holding him," you mean you put him in a cell, don't you? A. We usually do.

Mr. Christensen: That is all.

Further Redirect Examination

By Mr. Tolin:

Q. Suppose he makes bail, he would go out on bail, wouldn't he?

A. I can't explain that part of it.

Mr. Tolin: That is all.

Further Recross-Examination

By Mr. Christensen

Q. Bail isn't set, isn't that a fact, until after he is booked?

A. I don't know anything about that part.

Mr. Christensen: That is all.

Mr. Tolin: Mr. Christensen, when we were talking about a possible stipulation on that Exhibit 9, I had used some exemplars of handwriting. Here is Exhibit 1 and Exhibit 2, [68] and Mr. Myer used that in arriving at his opinion.

If you can't give us an answer this afternoon, we would like to know to line up the witnesses.

Mr. Christensen: To save time, I will stipulate to this: If Mr. Myer is called, he will testify with

(Testimony of Orville E. Harper.)

reference to the signature on Exhibit 1 that is the signature of Allen Smiley made in his presence.

Mr. Tolin: No. That takes further foundation. Mr. Dunn will have to testify to this signature being made in his presence.

Mr. Christensen: What is it you are going to call Mr. Myer for?

Mr. Tolin: I am going to call Mr. Myer to testify that he has examined Exhibit 1 with respect to the true signature of Mr. Smiley.

Mr. Christensen: I will then stipulate that Mr. Myer will testify, upon a comparison of Exhibit 1 and Exhibit 9, that the names——

Mr. Tolin And Exhibit 2.

Mr. Christensen: And Exhibit 2, that the names “Allen Smiley” written on those are one and the same.

Mr. Tolin: Were written by the same person.

Mr. Christensen: One and the same, written by the same person.

Mr. Tolin: And that Don Myer would further testify that [69] his occupation is that of an examiner of questioned documents——

Mr. Christensen: I will stipulate to his qualifications.

Mr. Tolin: As a handwriting expert?

Mr. Christensen: Right.

Mr. Tolin: Then I will offer Exhibit 9 in evidence.

Mr. Christensen There will be an objection to

(Testimony of Orville E. Harper.)

it as irrelevant and immaterial to the issues in this case.

Mr. Tolin: Yes, Mr. Christensen, we are overlooking, also, that I agreed to stipulate that Mr. Smiley, this defendant, was tried on the charge that is referred to in Exhibit 9, and that the jury found him not guilty.

Mr. Christensen: Correct, so stipulated.

The Court: It may be received.

Mr. Christensen: I have the objection, your Honor, and it will be overruled?

The Court: Yes.

The Clerk: Plaintiff's Exhibit 9 in evidence.

(The document referred to was marked Plaintiff's Exhibit No. 9 and was received in evidence.)

Mr. Tolin: May I pass it to the jury?

I will call Mr. Cox.

My attention is called to the fact that Exhibits I and 2, which were heretofore for identification, were not offered in evidence. I offer them in evidence at this time.

Mr. Christensen: I haven't seen these, your Honor. [70]

Why don't you withhold these until the morning and go on with the witness now?

Mr. Tolin All right.

(Witness excused.)

THOMAS ALBERT COX

called as a witness by and on behalf of the plaintiff,

(Testimony of Thomas Albert Cox.)

having been first duly sworn, was examined and testified as follows:

The Clerk: Your full names, please.

The Witness: Thomas Albert Cox.

Direct Examination

By Mr. Tolin:

Q. Mr. Cox, what is your occupation?

A. Manager of an escrow department.

Q. By whom are you employed?

A. Security Bank, Adams-Crenshaw Branch.

Q. That is the Security-First National of Los Angeles? A. Yes, it is.

Q. Mr. Cox, we have been having a little difficulty with people hearing in this room. This air-conditioner back here makes it very difficult, and the architect, unfortunately, put the jury box in the dead spot as far as hearing is concerned, so we will have to ask you to speak up.

Were you at one time connected with the Beverly Hills Police Department? A. Yes, I was.

Q. Were you employed there during the year 1947? A. Yes.

Q. What was your occupation there with the Police Department?

A. Desk clerk? I suppose you would call it something like desk clerk.

Q. Desk clerk? A. Yes.

Q. Did you have anything to do with the identification records of prisoners?

A. Yes, I was one of the fellows who kept all

(Testimony of Thomas Albert Cox.)

of the identification records together, and also was used for booking.

Q. When a man would be brought into the police station in custody, what was the method by which the arrest report and identification papers were prepared? That is, those papers which showed his address and the various elements of identification, such as color of eyes, and so on.

A. Well, perhaps if I could see an arrest report to refresh my memory.

Q. I have a photostat of one here. Will that help you? It is the one I was using myself with respect to this inquiry.

Mr. Neeb: May we see that, Mr. Tolin?

Q. (By Mr. Tolin): May I have that one, and I will pass it to counsel, and I will show you Exhibit 7, for identification. Now, can you tell us what the procedure is that is [72] followed in getting the information to enter on a document such as that document, Exhibit 7, for identification?

A. The person arrested, or the person brought in for booking, would be brought to the booking counter, and the desk clerk, or whoever is on duty at the time, would ask questions in following this arrest report; ask for their names, addresses, and so on and so forth; and we just fill them in as to their answers.

Q. What do you mean, "we fill them in as to their answers"? Who are "we" and who are "they"?

(Testimony of Thomas Albert Cox.)

A. In this particular arrest report—these arrest reports have places for the name of the person arrested, his address, occupation, and so on. We would ask the person arrested what their name was and fill in the answer, and what their occupation was, and so on; as we ask these questions we would fill in on the arrest report their answers.

Q. Did you ever have occasion to ask the defendant, Allen Smiley, questions so that you could fill in answers on an arrest report? A. Yes, I did.

Q. And when was that?

A. That was in June or July of 1947.

Q. What was the occasion?

Mr. Christensen: Just a moment. “What was the occasion” is irrelevant and immaterial. What did he do at the time he [73] was asking the questions and was booking, that is what we are interested in.

The Court: I think so.

Q. (By Mr. Tolin): Was he a person that was in custody of the Beverly Hills Police Department at that time? A. Yes, he was.

Mr. Tolin: Mr. Christensen, I know what you have in mind, and I don’t want——

Mr. Christensen: I don’t want to get into collateral issues.

Mr. Tolin: Neither do I. And I will stipulate that he was never convicted of any charge in connection with that arrest.

Mr. Christensen: He was never even charged.

(Testimony of Thomas Albert Cox.)

Mr. Tolin: I will stipulate to that. There had been a murder, and he was a person that was near, and he was questioned along with other people.

Mr. Christensen: Yes, because he was there at the time and was also shot.

Mr. Tolin: I didn't get that.

Mr. Christensen: He happened to be there and he also was shot.

Mr. Tolin: This defendant was shot?

Mr. Christensen: Yes. They have got the coat out there where the bullets went through. And we are getting into [74] collaterals.

Mr. Tolin: Perhaps we had better stay out of the collaterals.

Mr. Christensen: I think so, too.

Q. (By Mr. Tolin): I will ask you, then, Mr. Cox, did you ask the defendant Smiley any questions at that time? A. Yes.

Q. And did he give certain answers?

A. Yes, he did.

Mr. Christensen: If it will shorten the matter on this, as to the questions that were asked with reference to residence, birth, and that are germane to this issue, I will have no objection to that phase of it going into the record, subject only to an objection that it is irrelevant and immaterial.

Mr. Tolin: Shall I read the portions that I deem relevant? I will point them out to you first, so that you can call me.

“Person Arrested. Smiley, Allan.

(Testimony of Thomas Albert Cox.)

“Residence Address. 1220 Sunset Plaza Dr., Los Angeles, Calif. Phone. Cr. 19145.”

The date, 6/21/47. That appears to be the date of the report.

Mr. Christensen: That’s right.

Mr. Tolin: Question: “Hair. Grey. Eyes. Blue. Height. 5/11. Weight. 170. Age. 39. Complexion. Ruddy. [75] Build. Medium.

“Descent. Jewish. Nationality. American.

“Where Born. New York, New York. Date Born. 1/10/08.

“Time in County. 20 Yrs. State. 20 Yrs. U.S.A. Life.

“Occupation. Hotel Owner (part interest).”

Arrested by Captain White, Sergeant Alcorn.

Mr. Christensen: That, of course, wasn’t his answer. That was simply a detail.

Mr. Tolin: That’s right. That last, arrested by Captain White, Sergeant Alcorn, is an entry which is not claimed to be a question put to the defendant or answered by him.

The date is an entry upon it, but not intended to be a question asked of this defendant or answered by him.

The other matters, I understand, it is stipulated were questions asked of the defendant by this witness Cox and answered by the defendant to Cox as appears within the language of this stipulation?

Mr. Christensen: Yes, and received subject to the motion that it is irrelevant and immaterial.

(Testimony of Thomas Albert Cox.)

The Court: It may be received.

Mr. Tolin: We don't need the exhibit. We have the stipulation.

The Court: Is that all from this witness?

Mr. Tolin: Yes.

The Court: You are excused.

(Witness excused.) [76]

Court will stand at recess until 10:00 in the morning.

Keep in mind the court's admonition.

Mr. Christensen: 10:00 o'clock?

The Court: Yes, 10:00 o'clock.

(Thereupon, at 4:15 o'clock p.m., an adjournment was taken until Wednesday, July 13, 1945, at 10:00 o'clock a.m.) [77]

Wednesday, July 13, 1949, 10:00 A.M.

The Court: You may proceed.

Mr. Tolin: If the Court please, I would like to tender at this time government's proposed instructions. There is one set which I first hand to the Clerk, which are the instructions that are particularly applicable to the case. The next which I will now hand him is a request for general instructions.

We have quite commonly been requesting general instructions by number, and the number refers to the standard instructions of a general nature which have been given by Judge Mathes, of which

there are mimeographed copies in the judge's chambers. If you don't have them, Mr. Christensen—I think most of the bar have—I will supply you with them.

Mr. Christensen: No, I haven't. I think mine follow partially Judges Mathes, Judge Hall, and Judge McCormick.

Mr. Tolin: Judge Mathes' follow very largely the Judges James instructions.

The Court: I have had a copy of Judge James' instructions for 12 years, and those are the ones I use here and in Arizona.

Mr. Christensen: They are competent and excellent and a comprehensive set.

The Court: Yes. [81]

Mr. Tolin: We are satisfied with Judge James' instructions. And then the instructions that must be drawn for any particular case are separately bound in the group that I have just submitted to the court.

Shall I proceed with the evidence?

The Court: You may.

Mr. Tolin: I have sent to the witness room.

MILTON S. HOPKINS

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please.

The Witness: Milton S. Hopkins.

(Testimony of Milton S. Hopkins.)

Direct Examination

By Mr. Tolin:

Q. Mr. Hopkins, what is your occupation?

A. I am retired deputy sheriff, senior clerk, from the Los Angeles County Sheriff's department.

Q. Were you on active duty in the Sheriff's department during the year 1944?

A. Yes, sir, I was.

Q. What kind of work were you doing there at that time?

A. I was senior clerk in charge of the department on that shift, and I booked prisoners part of the time.

Q. Did you have occasion to book the prisoner Allen Smiley? [82]

A. Yes, sir, I did.

Q. Do you see him here in the courtroom?

A. Yes, sir.

Q. Which person is he? A. Pardon?

Q. Which man is he?

A. The last man at the table sitting there (indicating).

Q. You indicate the gray-haired man at the end of the defense table? A. Yes, sir.

Q. What did you do when you took some part in the booking of that prisoner at that time?

A. The first thing when he was brought in, I filled out the upper part of the booking slip so that the arresting officer could put on his signature, and then he could go.

(Testimony of Milton S. Hopkins.)

Q. Did Mr. Siu bring the prisoner to you?

A. Yes, sir, he did.

Q. And then, after you had filled in the first part of the booking record, Mr. Siu went away, is that your testimony? A. Yes, sir.

Q. After that did you talk to the prisoner?

A. Yes, sir, when we started booking them, I booked this prisoner.

Q. You have before you Exhibit 5 for identification, and you are holding it in your hand; will you look at it and [83] see if there is some part of that that you filled in while the prisoner Smiley was there in your presence?

A. I filled in all of that while he was there.

Q. Did you ask him any questions before you filled in any part of that?

A. We asked him each and every question for each compartment on each line, and fill in the information that the prisoner gives to us at that time.

Q. There appears upon Exhibit 5, for identification, the printed words "Birthplace City State," and then the typewritten words "New York, N. Y."; who put that on Exhibit 5, for identification?

A. I put that on there.

Q. Where did you get that information?

A. We get that information from the answer the prisoner gives to us when we ask the question, "Where were you born?"

Q. And then there appears the printed word

(Testimony of Milton S. Hopkins.)

“Age” and the typewritten figures “37”; did you put that on there? A. I did.

Q. Where did you get that information?

A. By asking the prisoner, as we always do.

Q. Then there appears down a little farther, “Lived in City County State,” and it is typewritten after those printed words, “17 years”; did you put that typewritten portion on there? [84]

A. Yes, sir, I did.

Q. And from whom did you get that information? A. From the prisoner himself.

Q. By “the prisoner,” whom do you mean?

A. I mean Allen Smiley.

Q. Is that true, also, of the next answer in the line, that is to say, the question, “U. S. Citizen,” and the answer, “Yes”^a

A. That is correct. During the last 15 years of so that I was booking prisoners there, I asked that question of each prisoner deliberately and positively, because I helped a neighbor get citizenship, and I knew a man who was American, went to Canada, renounced his citizenship, and later on he came back thereafter——

Mr. Christensen: Just a moment, Mr. Witness. I think that is not responsive, and I move to strike out the latter portion of his answer.

The Court: It may be stricken.

Q. (By Mr. Tolin): What did you do with that Exhibit 5, for identification, after you had filled in those things?

(Testimony of Milton S. Hopkins.)

A. Then we have a prisoner sign the booking slip.

Q. I didn't note his signature on that one.

A. It is on the lower half.

Q. Will you show me where it is?

A. No. This is the upper half. This is torn off, you see. One part goes to the prisoner, one part goes to various different places, the department of property, the original part goes one place, and different parts of the slip go different places.

Q. What was the nature of the part that was torn off and given to him?

Mr. Christensen: Just a moment. That is not the best——

The Witness: The part——

Mr. Christensen: Just a moment, Mr. Witness. When I am talking you are not supposed to continue.

I suggest that is not the best evidence. Let's have whatever it is he is talking about.

Mr. Tolin: I am not asking him for the text of it; I am just asking him the nature of it.

The Court: Was it a duplicate of what you have in your hand?

The Witness: It was the original signed, and this is——

The Court: No. I say, was it a duplicate of what you have in your hand?

The Witness: No. Just the bottom half.

Mr. Tolin: May I ask another question?

(Testimony of Milton S. Hopkins.)

Q. (By Mr. Tolin): Is it a matter on a different subject entirely than what appears upon the part that you now hold in your hand?

A. Yes, it covers the property only. [86]

Q. And was that given to Mr. Smiley in this case?

A. Yes. The yellow slip was, yes, sir.

Q. The part that was below this that now constitutes Exhibit 5?

A. Yes.

Q. Did he at any time during his conversations with you at that time, either in the presence of J. E. Siu, the other deputy, or after Mr. Siu had left, say anything to you about his being or having been a citizen of any nation other than the United States?

A. No, sir.

Mr. Tolin: I have completed the direct examination.

Cross-Examination

By Mr. Christensen:

Q. You say you have been doing this work for the sheriff's office for about 15 years, booking prisoners in the county jail?

A. I have been 28 years.

Q. And so in the course of that period of time you have booked thousands of prisoners?

A. Many thousands of prisoners.

Q. And you have booked many thousands, as a matter of fact, since the 25th of May, 1944, isn't that right?

A. I booked many since then.

(Testimony of Milton S. Hopkins.)

Q. And met thousands? [87]

A. Well, several thousands since that time.

Q. And you say now that you have an independent recollection that way back on May 25, 1944, you remember actually talking to Mr. Smiley? Answer that question.

A. If there is any doubt as to the identity his fingerprints on the slip you hold in your hand will match the ones he has on his fingers.

Q. I am not asking you that at all. I am asking you whether or not you will now say to this jury that you have an independent recollection that on May 25, 1944, you had a talk with Mr. Smiley and interrogated him and asked him certain questions.

A. If I had——

Q. Now, just a moment——

A. If I had I would not have recognized——

Q. Do you understand the question?

A. I would not have recognized a man among those thousands, but I know my signature, I know my booking and his fingerprints will connect him with the prisoner there.

Q. Then, as a matter of fact, as you sit on the witness stand now you do not have any personal independent recollection that you asked the questions that you testified to here and that he gave those answers and you only say he did that because it is a matter of your practice?

A. I recognize him because of the fact that at the other time, the other man was booked, Mr. George

(Testimony of Milton S. Hopkins.)

Murray wanted to book the other man because of the greater publicity and I booked him.

Q. Well, now, will you read the question, Mr. Reporter.

(Question read as follows:

“Q. Then, as a matter of fact, as you sit on the witness stand now you do not have any personal independent recollection that you asked the questions that you testified to here and that he gave those answers and you only say he did that because it is a matter of your practice?”)

Q. (By Mr. Christensen): Will you answer that yes or no? A. Will you read it again?

(Question reread.)

Q. Can you answer that question?

A. I remember booking him because of George Murray booking Bugsy Siegel next to him.

Q. Will you answer the question?

Mr. Tolin: He is answering it.

Mr. Christensen: He says recalls booking him but that is not my question, your Honor.

The Court: All right, reread the question.

(Question read as follows:

“Q. Then, as a matter of fact, as you sit on [89] the witness stand now you do not have any personal independent recollection that you asked the questions that you testified to here and that he gave those answers and you only say he did that because it is a matter of your practice?”)

(Testimony of Milton S. Hopkins.)

The Witness: No, but I do remember booking him because all of the photographers and the rest of us were there.

Q. (By Mr. Christensen): Then I will ask you this question: So, as you sit on this witness stand you now say that you have an independent recollection that you asked the specific questions appearing on Plaintiff's Exhibit 5 for identification and also that you remember that he gave the particular answers that are written on that particular exhibit?

A. I do remember that I asked those questions and I put down the answers that was given to me.

Q. Then you remember that instance in the many thousands of instances that you have had?

A. Only a few of them stand out and those are those that had the greatest publicity at the time. I was going to start booking Bugsy Siegel but George Murray wanted to book him first because of the publicity there.

Q. Just a moment. I move to strike out the voluntary statements of this witness, your Honor, as not responsive.

The Court: He is stating the reason why remembers.

Q. (By Mr. Christensen): Well, let me ask you if you [90] have ever seen this Exhibit 4 before.

A. Which one is Exhibit 4?

Q. Right here. I am showing it to you.

A. (No answer.)

Q. You have seen that before, have you not?

(Testimony of Milton S. Hopkins.)

A. Yes, I have seen this before. [91]

Q. Did you see that at the time you were booking him?

A. Well, there are so many I have in there I cannot say definitely that I have seen this particular one. I have seen so many but——

Q. On this particular No. 4 you can't have any independent recollection of seeing that?

A. Well, it is very familiar to me but I would not say definitely because there have been so many.

Q. Is it familiar to you because of the fact it is the practice of the arresting officer when he brings the prisoner in to then hand you this preliminary arrest booking slip that he has made?

A. Yes, sir, he does.

Q. And so as a matter of practice you will then say that you saw this at the time Mr. Siegel and Mr. Smiley were before you?

A. In that part I just merely take—have the charge to sign up—sign up for the charge and let the officer go.

Q. I see. So when Mr. Siu brought Mr. Smiley in he at that time handed you Exhibit 4, isn't that correct?

A. It is quite likely that he did.

Q. Isn't it the practice for him to hand it to you? A. It is.

Q. But you have no independent recollection that he did hand it to you? [92]

A. On that particular one, no.

(Testimony of Milton S. Hopkins.)

Q. You don't? A. No, sir.

Q. So when this is handed to you you then have that before you at the time you make out Exhibit 5, is that right?

A. Only the top part. When the officer leaves he takes that with him and we see that no more when we book the prisoner, and the prisoner stands before us when we start it and we do not have that—we have nothing pertaining to that.

Mr. Tolin: May the record show that the witness said, when he said: "We do not have that," he placed his hand on Exhibit 4.

Q. (By Mr. Christensen): Well, what you mean to say is that when the prisoner is brought in, the first thing the officer does is to hand you Exhibit 5, is that right?

A. Not always. He will sometimes take it and lay it beside him and fill out the slip but, in most cases, we slip this in the typewriter and we would have that there or sometimes just the charge. He might hold that in his hand. We might not have—we might not have contact with that at all.

Q. And isn't it also——

Mr. Tolin: May the record show that whenever the witness said——

Mr. Christensen: He was referring to Exhibit 4.

Mr. Tolin: He had Exhibit 4 in his hand.

Mr. Christensen: Yes, Exhibit 4.

(Testimony of Milton S. Hopkins.)

Q. And oftentimes you will take this slip, isn't it true, and put it in your typewriter and have—that is Exhibit 5——

A. We never have that there at the time.

Q. ——and you will have Exhibit 4 before you?

A. No, sir; we never have that when we are booking the prisoner.

Q. You always give it back to him, do you?

A. The arresting officer takes that part and then he sometimes leaves some other things, once in a great while, but we never used that at all for booking the prisoner. We get the information we put there directly from the prisoner by asking him the question.

Q. But when he brings them in the first document you will see will be Exhibit 4, isn't that right?

A. Not always. We may never see that.

Q. I see.

A. The officer may just fill in the charge and where he was arrested and sign his name.

Q. Well, have you any recollection whether you saw Exhibit 4 for identification? A. No, sir.

Q. At all? [94]

A. No, sir, I don't recollect that I did see that.

Q. But you do have a definite recollection that you saw Exhibit 5? A. I do.

Q. That you filled that out and had Mr. Siu sign it and then you asked the questions and the answers were given as below? Do you remember that? A. (No answer.)

(Testimony of Milton S. Hopkins.)

Q. Now then, have you any independent recollection as to the upper portion—we will eliminate the lower portion on Exhibit 5, speaking with reference to the upper portion which contains Mr. Siu's signature. Do you recollect from where you got that information?

A. The officer bringing the prisoner in gives us the charge and where he was arrested.

Q. Does he give it to you orally or off of Exhibit 4 for identification?

A. Sometimes one way and sometimes the other.

Q. Well, do you recall now whether or not you may not have gotten it off of Exhibit 4 for identification?

A. I don't even know if I saw that at all.

Q. You don't know. So in this instance you don't know how you got it?

A. This information—all there is here——

Q. Never mind that. Do you know how you got that [95] information, whether you got it direct from Mr. Siu, the prisoner, or off of Exhibit 4?

A. We never get it from the prisoner. Either got it from Mr. Siu or from the slip and the probability is that——

Mr. Tolin: Does that question refer to the top portion?

Mr. Christensen: That is all. Yes, the top portion of Exhibit 5.

Mr. Tolin: That portion above the signature?

Mr. Christensen: That is right.

(Testimony of Milton S. Hopkins.)

Mr. Tolin: Of Mr. Siu?

Mr. Christensen: That is right.

Mr. Tolin: Have you completed your examination?

Mr. Christensen: Yes, I am through.

Redirect Examination

By Mr. Tolin:

Q. Is this Exhibit 5 for identification a record that is kept by the Sheriff's Office in the regular and ordinary course of its business?

A. Yes, sir.

Q. And acted upon by it in whatever business it has concerning the prisoner? A. Yes, sir.

Q. And is it required or was it required at the time that you made it out to be preserved and kept as a record? A. Yes, sir. [96]

Mr. Tolin: Thank you. May this witness be excused?

Mr. Christensen: No, just a question or two.

Recross-Examination

By Mr. Christensen:

Q. When you say "required," from whom did you get instructions to use that particular form?

A. That form has been in use for several years.

Q. It is some form that was developed over there and it was in your office and you used it under directions that you should use it?

A. Yes, sir; it is the customary procedure.

(Testimony of Milton S. Hopkins.)

Q. When you say it was required, you didn't examine or ascertain under the law whether you were entitled to even ask those questions, did you?

A. When the Sheriff's Department operates it operates under the law.

Q. Will you answer my question, please? What was his answer?

(Answer read.)

Mr. Christensen: Will you read the question?

(Question read, as follows:

("Q. When you say it was required, you didn't examine or ascertain under the law whether you were entitled to even ask those questions, did you?")

The Witness: We do. [97]

Q. (By Mr. Christensen): Can you answer that question yes or no. A. We operate by law.

Q. I appreciate that, but that isn't my question. You say it was required so I am asking you a simple question.

Will you please read the question again, Mr. Reporter?

(Question read.)

The Court: Was it required by a superior officer of yours?

The Witness: The Sheriff himself supervised the forming of that form that we use there.

Q. (By Mr. Christensen): In other words, you found a form in your office and you were told to

(Testimony of Milton S. Hopkins.)

use that form in booking prisoners and that is what you did, was use that form?

A. That is correct.

Q. Now, on this particular occasion when Mr. Smiley was brought in were there a lot of persons around at the time in addition to Mr. Siu and Mr. Smiley?

A. There were.

Q. A lot of photographers?

A. Yes, quite a bit of commotion going on.

Q. Quite a number of photographers?

A. (No answer.)

Q. Is that right? [98] A. (No answer.)

Q. I say quite a number of photographers were present at the time?

A. I don't know how many there were but I know there were flashlight bulbs going off in there.

Q. There were more than one?

A. I was under the impression that there were.

Q. A number of newspaper men there?

A. Yes.

Q. For instance, all together, how many were there at the time, in addition to Mr. Siu and Mr. Smiley and those from the Sheriff's office?

A. I do not recall.

Q. Would you say it was five?

A. I wouldn't say.

Q. Ten? A. I would not say.

Q. Twenty? A. I would not say.

Q. Can you give us the names of any of the

(Testimony of Milton S. Hopkins.)

newspaper men or photographers who were there?

A. No, sir.

Mr. Christensen: That is all.

Mr. Tolin: Now may the witness be excused?

The Court: Yes.

Mr. Tolin: Thank you, sir.

(Witness excused.)

Mr. Tolin: I offer in evidence 5, for identification.

The Court: Is there any objection?

Mr. Christensen: Yes, the objection that it is irrelevant [100] and immaterial, your Honor.

The Court: It may be received.

The Clerk: Exhibit 5 marked in evidence.

(The document referred to was marked Plaintiff's Exhibit No. 5 and was received in evidence.)

Mr. Tolin: May I pass it to the jury? And, because counsel for the defendant used No. 4 in his examination respecting it, I would like to pass 4 also.

Mr. Christensen: I think that is in evidence, No. 4?

Mr. Tolin: Yes.

I call Mr. Hood.

RICHARD B. HOOD

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

(Testimony of Richard B. Hood.)

The Clerk: Your full name, please?

The Witness: Richard B. Hood.

Direct Examination

By Mr. Tolin:

Q. Mr. Hood, what is your occupation?

A. I am special agent in charge of the Los Angeles office of the Federal Bureau of Investigation.

Q. How long have you been so employed?

A. Over nine years.

Q. Were you with the Bureau prior to that time? A. Yes, sir. [101]

Q. Are you familiar with the use that the Federal Bureau of Investigation makes of identification material and information taken from prisoners in various police stations, sheriffs' offices, and the like? A. Generally, yes.

Q. Will you tell us what that use is?

Mr. Christensen: Just a moment, Mr. Hood.

To that, I object, your Honor. It is irrelevant and immaterial, whether they make use of that or they make use of Gallup polls, or what they may do. The question is in this case whether or not he affirmatively made a representation of citizenship that defrauded someone, intentionally, falsely, to someone. They may gather their information from high and wide, your Honor, and that will not show materiality in this case. It must grow out of the very essence of the thing that was being inquired into at that time, and not because of collateral reasons. It is wholly irrelevant and immaterial, your Honor.

(Testimony of Richard B. Hood.)

The Court: He may answer.

The Witness: From the information obtained on criminal fingerprint cards submitted to the Bureau by various law-enforcement agencies, we may from time to time prepare identification orders, we may on direct inquiry from a law-enforcement agency furnish them complete or summary bits of information from those identification cards if they ask it. [102] We use it ourselves for seeking the apprehension of fugitives and others whom we have process out for or wish to locate.

Q. (By Mr. Tolin): Is the information regarding the nationality or citizenship of a subject who is reported on one of those cards used by your Bureau in the way in which you have described?

Mr. Christensen: Just a moment. I make the same objection, your Honor, and also the further objection that it is highly prejudicial.

The Court: It is what?

Mr. Christensen: Highly prejudicial.

The Court: He may answer.

The Witness: It might well be in some instances. It is a pertinent part of the identification record, the same as a man's age or his height or his weight. Frequently it would be of tremendous value to an investigating officer if he had that information. That is why it is on there.

Q. (By Mr. Tolin): Is there any central place in the United States that you know of where identification material concerning persons suspected

(Testimony of Richard B. Hood.)

of crime, arrestees, and persons prosecuted, is kept?

Mr. Christensen: The same objection, your Honor.

The Court: He may answer.

The Witness: The Bureau maintains those records in Washington, D.C., in its Identification Division. [103]

Q. (By Mr. Tolin): By the "Bureau" do you mean the Federal Bureau of Investigation?

A. Federal Bureau of Investigation.

Q. Is the Immigration and Naturalization Service of the United States a division of the Federal Bureau of Investigation?

A. No. It is a separate department—division of the Department of Justice.

Q. Do you supply the Immigration and Naturalization Service of the United States with information which you receive from—well, in the manner that you have testified to?

A. Those files are available to them at any time.

Q. Do you ever determine, that is, does the Federal Bureau of Investigation ever determine, on its own motion or pursuant to law or regulation, to refer information concerning an arrestee to the Federal Bureau of Investigation? I mean to the Immigration and Naturalization Service.

A. At any time in connection with our cases, when an alien receives a sentence in court, the Immigration Service is automatically advised of that fact.

(Testimony of Richard B. Hood.)

Q. By your department?

A. By our department.

Mr. Christensen: Just a moment. May I have the same objection without renewing it?

The Court: Yes. [104]

Mr. Christensen: At this time I will make a motion to strike. Or may it appear as if the objection was made before the answer?

The Court: To all of the testimony of the witness.

Q. (By Mr. Tolin): In determining whether to make a referral to the Immigration and Naturalization Service, do you use the identification material respecting which you have testified?

A. Frequently it is necessary, in view of similarity of names and other reasons, to give the complete summary on the identification card, on the fingerprint card.

Mr. Tolin: I have completed the direct examination.

Cross-Examination

By Mr. Christensen:

Q. Mr. Hood, the Immigration Service, that is, the Naturalization and Immigration Service, they likewise keep identification records that are available, then, to your department?

A. Not on just fingerprint cards, sir. That is maintained—the sole one is maintained by the F.B.I. They have their own immigration records.

(Testimony of Richard B. Hood.)

Q. Yes, and those are available to you?

A. Yes, sir.

Q. In other words, in the instance, hypothetically, if you are interested in ascertaining whether there was any [105] proceeding pending against Mr. Smiley, say, in that department, why, then, those records would be available to you?

A. Yes, sir.

Q. And if you were interested in ascertaining whether he was an alien, or not, you could go to those records and see if there was anything there?

A. We would probably check their records, yes, sir.

Q. You would also, would you not, make a check of registrations of aliens, such as indicated by Exhibit 1? Are you familiar with this form?

A. No, sir, I am not.

Q. I thought maybe you were.

A. I haven't seen this particular form. We would check every record possible that we could locate at any source for bearing on the matter.

Q. If you were at all interested from an alien standpoint, you would check your own United States Government records first, wouldn't you?

A. Yes, we would check our own F.B.I. records first, we would start there.

Q. And if you were interested in alienage you would do that with your own Immigration and Naturalization Service department?

(Testimony of Richard B. Hood.)

A. Their law-enforcement agencies, every source that we could contact. [106]

Q. Did you at any time have occasion to ascertain whether or not Mr. Smiley was an alien? Did you ever make such an investigation?

A. Not personally, no, sir.

Q. Was your department ever interested in doing so? A. Yes, sir.

Q. When was that?

A. I do not know the exact date, sir.

Q. Was that back along in '44 and '45?

A. Approximately, yes, sir.

Q. At or about that time did you ascertain from the immigration records that Mr. Smiley had been before the department and had been sworn and testified there as to his being a Canadian citizen. and that he was born in Russia?

A. I personally have no knowledge of it.

Q. I mean your department, did it make such an investigation?

A. I don't know what they found, sir.

Q. And assuming, if they did find that and he at that time under oath testified as to his alienage, of course you wouldn't be interested in any police records when you once obtained those records from that source, from your own official source, isn't that right?

Mr. Tolin: That is objected to as argumentative.

(Testimony of Richard B. Hood.)

The Court: That is purely argumentative. [107]

Mr. Christensen: That is all.

Mr. Tolin: May Mr. Hood be excused?

The Court: Yes.

Mr. Tolin: Thank you, Mr. Hood.

(Witness excused.)

Mr. Tolin: Mr. Cunningham.

FRANK H. CUNNINGHAM

recalled as a witness by and on behalf of the plaintiff, having been previously duly sworn, was examined and testified further as follows:

Further Direct Examination

By Mr. Tolin:

Q. Mr. Cunningham, you were sworn yesterday, but I overlooked one phase of inquiry with you.

You are an executive in the Record and Identification Bureau of the Los Angeles Police Department, is that correct? A. I am.

Q. Are you familiar with the regulations under which that department operates?

A. Reasonably so.

Q. Does that department, when a person who is arrested gives information that he is not a citizen of the United States, does your bureau refer that information on to any agency of the United States——

Mr. Christensen: Just a moment. That is objected to. [108]

(Testimony of Frank H. Cunningham.)

Q. (By Mr. Tolin): —other than the F.B.I.? I am not interested in that referral.

Mr. Christensen: That is objected to as irrelevant and immaterial and for all the reasons ascribed to the testimony of Mr. Hood.

The Court: He may answer.

The Witness: Yes, we do, Mr. Tolin. If it is brought to our attention in the arrest report that the man is an alien or illegal entry, if some information comes to our attention that way, we call up the Department of Immigration. I believe Mr. Pendergast and Mr. Cole or Mr. Nelson are the men we generally contact.

Q. (By Mr. Tolin): And you give them that information? A. Yes, we do.

Mr. Tolin: You may cross-examine.

Cross-Examination

By Mr. Christensen:

Q. In the instance of Mr. Smiley here, did you advise the Naturalization and Immigration Service, Mr. Pendergast or anyone else?

A. I didn't, no.

Q. Did your department seek any information from that Naturalization and Immigration Service?

A. Concerning Mr. Smiley?

Q. Yes. [109]

A. I have no knowledge of that.

Q. When you talk about information, you will advise the Federal Bureau of Investigation about

(Testimony of Frank H. Cunningham.)

fingerprints, and even the State department, of arrests and the nature of the offense, and so forth?

A. That is automatic, we send our fingerprint cards to Sacramento and Washington.

Q. And along with those cards there will be a lot of detail and information that you may have picked up here, there, and yon, isn't that correct?

A. Only the specific charge for which he was arrested at that time.

Q. In your booking and so forth, you, of course, are interested in a lot of statistical information for purely police purposes, isn't that right?

A. I didn't understand the question.

Mr. Christensen: Read it, please.

(The question was read by the reporter.)

The Witness: That is right, yes.

Q. (By Mr. Christensen): That information that you seek, such as the address and alienage, marriage, or otherwise, is information that hasn't anything to do with the charge itself upon which the prisoner is being held?

Mr. Tolin: Objected to as calling for a conclusion of the witness, calling for his opinion upon thousands of records, [110] and also calling for the opinion of a man in a record and identification department——

Mr. Christensen: I am inclined to think you are right. I will withdraw the question.

That is all.

Mr. Tolin: Just one other question.

(Testimony of Frank H. Cunningham.)

Redirect Examination

By Mr. Tolin:

Q. Was this practice of referral to the Immigration Service enforced during the years 1944, '45, '46, and '47? A. Yes, sir, it was.

Mr. Tolin: Thank you. That is all.

May this witness be excused?

The Court: Yes.

(Witness excused.)

Mr. Tolin: Mr. Dunn.

PERLEY B. DUNN

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Perley B. Dunn.

Direct Examination

By Mr. Tolin:

Q. Mr. Dunn, what is your occupation?

A. Investigator of the Immigration and Naturalization [111] Service, Los Angeles.

Q. How long have you been so employed?

A. January 22, 1930.

Q. Do you know the defendant, Allen Smiley?

A. I do, yes.

Q. Did you have occasion to take his fingerprints? A. I did, yes, sir.

(Testimony of Perley B. Dunn.)

Q. I place before you Exhibits 1 and 2, for identification. Let's look at 1 first. I feel we had better look at 2 first.

Mr. Christensen: If you are using them for foundational purposes, we might shorten it. I mean if that is your object.

Mr. Tolin: Yes, it is. I was going to lay the foundation for the introduction of this application for registry as an alien, and the alien registration form into evidence.

Mr. Christensen: Let me see them. I may save you the trouble.

We will stipulate on Exhibit 1, for identification, it contains the signature of the defendant, Allen Smiley.

Mr. Tolin: And may it go into evidence without further foundation?

Mr. Christensen: Aside from foundation, I have some objections to it, but it has nothing to do with the foundation.

Do you want something on this other one?

Mr. Tolin: I want to know whether you are waiving [112] foundation on that.

Mr. Christensen: That is what I thought.

On the second page of the photostat copy of this Exhibit 2, for identification——

Mr. Tolin: You will find I placed some clips there as to the material to which I think you refer.

Mr. Christensen (continuing): ——that the sig-

(Testimony of Perley B. Dunn.)

nature there is that of Mr. Smiley. I will stipulate that that is his signature.

Mr. Tolin: I need more of a stipulation than that. I need a stipulation or we will have to get it through the witness that this document was prepared from information provided the person who typed it by the defendant, Allen Smiley, on the 25th day of October, 1945, and that it then was filed with the Immigration and Naturalization Service of the United States, and everything above the signature of Allen Smiley, that is, that all information above that signature was provided by the defendant, Allen Smiley, to the person who did the typing.

As to page 3, the supplemental sheet, I have no objection, if you don't want the second sheet in, to leaving it out.

Mr. Christensen: I think there is much material on the other that is irrelevant and immaterial and incompetent for the purposes of this proceeding. There may be something in there that may be pertinent, so I will go to the extent of [113] saying that it is his signature that is on that particular page.

Mr. Tolin: I think we are wasting more time than we are gaining.

Mr. Christensen: Apparently so, when you are going beyond the realms of the lawsuit issues.

The Court: We will have our morning recess at

(Testimony of Perley B. Dunn.)

this time. Keep in mind the Court's admonition, ladies and gentlemen.

(A recess was taken.) [114]

The Court: Will you stipulate, gentlemen, the jury are present and in the jury box and the defendant is in court with his counsel?

Mr. Christensen: So stipulated.

Mr. Tolin: So stipulated.

The Court: You may proceed.

Mr. Tolin: Your Honor, it turned out to be a provident recess. Mr. Christensen and I have agreed that the second sheet of Exhibit 2 for identification might be removed from the exhibit and not used.

The Clerk: Exhibit 2 for identification.

Mr. Tolin: And that part 14 shall be covered by the clerk so as not to be apparent—the questions and answers and data there shall not appear.

The Court: Very well.

Mr. Christensen: That is agreeable and with that stipulation I will stipulate that that is the signature and the questions were asked and the answers given.

Mr. Tolin: The questions were asked by Mr. Dunn, an official of the Immigration and Naturalization Service, and the answers were given by the defendant Allen Smiley and he was under oath at that time.

Mr. Christensen: Under oath at that time; yes. It is so stipulated.

(Testimony of Perley B. Dunn.)

Mr. Tolin: And that he was before Mr. Dunn pursuant to [115] a——

Mr. Christensen: Wouldn't that speak for itself?

Mr. Tolin: All right. I will put it in by other proof.

Mr. Christensen: You had one more exhibit you were talking about. I think it is No. 1. We can perhaps dispose of this exhibit.

Mr. Tolin: Mr. Christensen has made certain suggestions concerning Exhibit 1 and to which I am agreeable and they would call for the clerk covering all of page 2 of that exhibit or otherwise obliterating it, and the insert sheet which is headed—that a portion, a certain portion of it can be cut off.

Now, this is an official document of the Immigration Service and we could stick it back on again. Is that all right, Mr. Kidder?

Mr. Kidder: Yes.

Mr. Tolin: The portion beginning “during the last five years,” now immediately above that cut off that page. Then on page 3 the portion beginning—or, I will place a small check mark there and ending where I place the check mark shall be covered. Is that right, Mr. Christensen?

Mr. Christensen: Yes.

Mr. Tolin: Then it is stipulated that the signature of the defendant Smiley is his signature and that it is on a document which he filed with the

(Testimony of Perley B. Dunn.)

Immigration and Naturalization [116] Service of Los Angeles on or about the date which it bears. That is January 20, 1948.

Mr. Christensen: That is correct, your Honor, we so stipulate.

The Court: Very well.

Direct Examination

(Resumed)

By Mr. Tolin:

Q. Mr. Dunn, in your work with the Immigration and Naturalization Service, have you had anything to do with alien registry under that law that was effective at the outset of the late war?

A. Yes.

Q. What was the period of time during which aliens were to have registered under that law?

Mr. Christensen: Just a moment. That is asking him to testify to what the law is.

Mr. Tolin: I will bring the statute in and read it. I thought it was an easy way to get it in. If you object to it I will read the law.

Mr. Christensen: Well, of course, I think that is the better way, whatever the law requires, rather than having a witness interpret the law.

Mr. Tolin: We had been saving so much time I thought you might be willing to save a little more.

Is it stipulated these documents, Exhibits 1 and 2 may [117] go into evidence now?

(Testimony of Perley B. Dunn.)

Mr. Christensen: Subject only to the objection that they are irrelevant and immaterial, your Honor.

The Court: They may be received.

(The documents referred to were marked Plaintiff's Exhibits Nos. 1 and 2 and received in evidence.)

Mr. Christensen: There is no objection to foundation, but as to materiality there is.

Mr. Tolin: All right. Then I have nothing more to ask Mr. Dunn.

Mr. Christensen: I have no questions, obviously.

The Court: You are excused, Mr. Dunn.

Mr. Tolin: As to Exhibit 2, there are several dates stamped on it. I think, Mr. Christensen, we agreed that the date upon which it was executed was October 1, 1945.

Mr. Christensen: That is correct. You might even read the certificate on it into the record—I mean the stamp of the Immigration Service.

Mr. Tolin: "U.S. Immigration and Naturalization Service, October 1, 1945, Los Angeles, California."

Now, Mr. Christensen, concerning Exhibit No. 1 for identification, I understand that you have no objection to it as we have fixed it up here by deleting portions, but since you do have the objection to it upon a certain ground——

Mr. Christensen: I will withdraw the objection to that [118] exhibit.

Mr. Tolin: All right. Call Mr. Hamilton.

PHIL HAMILTON

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Phil Hamilton.

Direct Examination

By Mr. Tolin:

Q. Mr. Hamilton, what is your occupation?

A. Immigrant inspector.

Q. Connected with the United States Immigration and Naturalization Service?

A. United States Government.

Q. Stationed where?

A. Los Angeles, California.

Q. Were you so stationed and so employed on October 1, 1945? A. Yes, sir.

Q. Were you present at any time during the preparation of Government's Exhibit No. 2—that is the alien registration form?

A. I took Mr. Smiley over to Mr. Dunn's office, or accompanied Mr. Smiley and his attorney, as I recall, but whether or not I was actually present at the execution of [119] the form I don't have any personal recollection.

Q. What was the purpose of your accompanying him to Mr. Dunn's office?

Mr. Christensen: I object to that, your Honor, as irrelevant and immaterial, what his purpose was.

The Court: The document is in evidence.

(Testimony of Phil Hamilton.)

Mr. Tolin: Yes. I will ask another question.

Q. (By Mr. Tolin): Was Mr. Smiley at liberty or under arrest at the time you took him over there?

Mr. Christensen: That I again object to as irrelevant and immaterial.

The Court: I can't see any purpose of it but you may answer the question.

The Witness: He had immediately before that been placed under arrest by me, under a warrant issued by our central office and as I recall was then waiting for a bondsman to arrive to furnish \$1000 bond.

Q. (By Mr. Tolin): And was that arrest in connection with an immigration or naturalization matter?

Mr. Christensen: That is also objected to as irrelevant and immaterial.

The Court: He may answer.

The Witness: It was in connection with——

Mr. Tolin: I don't care. I just wanted to eliminate, Mr. Christensen, that it was a municipal arrest. I will [120] withdraw the question.

The Court: I said he might answer the question. You might not have heard the ruling.

The Witness: It was in connection with a deportation proceeding being instituted by the United States Government.

Mr. Tolin: You may cross-examine. May I pass Exhibit No. 2 to the jury?

(Testimony of Phil Hamilton.)

The Court: You may.

Mr. Christensen: I believe he answered the last question, did he not, your Honor? [121]

Cross-Examination

By Mr. Christensen:

Q. As an immigration inspector you are authorized, are you not, to conduct hearings on such deportation warrants as you say that you served upon Mr. Smiley, upon which he was released on a thousand-dollar bond? A. Yes, sir.

Q. In other words, you are a hearing officer, are you not? A. Yes, sir.

Q. You call in the alien and you interrogate him?

A. On that occasion I called him in and served a warrant on him.

Q. Yes, but in connection with this particular proceeding you did call him in and conduct a hearing and did interrogate him? A. Yes, sir.

Q. At that time you put him under oath?

A. Not on the occasion of service of the warrant. I informed him of his right of representation. At the subsequent hearing he was placed under oath, the continued hearing, when his attorney was present.

Q. That was an oath to testify truthfully and to answer truthfully any and all questions propounded by you, is that correct? [122]

A. Substantially, yes.

(Testimony of Phil Hamilton.)

Q. And the first hearing following the date of the service of this deportation warrant, which I recall now was October 1, 1945—if I am in error, correct that—you then interrogated him as to his citizenship, did you not? A. Yes, sir.

Q. And under oath on that interrogation he testified, did he not, to the effect that his best recollection was, according to information from his parents, he was born in Russia and brought to Canada as a child?

A. That is correct, yes, sir.

Q. Also that he remained in Canada until he was about 18 or 19 years old when he crossed at Detroit?

A. I was under the impression he was about 15 years.

Q. About 15 years, I believe that is correct, Mr. Hamilton. And he then stated to you that he believed he was a naturalized citizen of Canada because of the naturalization of his father at a time prior to his reaching the age of 15, that is, Mr. Smiley, the defendant here?

A. That's correct.

Q. And you had engaged in a long investigation prior to the serving of this warrant, had you not?

A. No, sir, I had not.

Q. I mean your office.

A. The office had, I believe, yes. [123]

Q. For a period of three, four years?

A. For how long, I wouldn't know. I would

(Testimony of Phil Hamilton.)

say probably a couple of years. Not continuously, but intermittently.

Q. And the testimony he gave you in that respect under oath conformed to the results of your investigation of the previous two years, isn't that correct?

A. I couldn't answer that——

Mr. Tolin: That is objected to as irrelevant and immaterial.

The Court: Yes.

A. (Continuing) ——because we start a hearing de novo.

The Court: Just a moment. I don't think that is material.

Mr. Christensen: That is all.

Mr. Tolin: That is all, Mr. Hamilton.

(Witness excused.)

Mr. Tolin: Mr. McIntire.

MORTON L. McINTIRE

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Morton L. McIntire.

Direct Examination

By Mr. Tolin:

Q. Mr. McIntire, what is your occupation? [124]

A. I am the identification officer at the Beverly

(Testimony of Morton L. McIntire.)

Hills Police Department.

Q. Were you such on 6/21/47? A. Yes.

Q. Do you know the defendant, Allen Smiley?

A. I do.

Q. Did you have something to do with respect to identification work of that defendant at that time, that is to say, on 6/21/47?

A. That's right, I did.

Q. Was he under arrest at that time?

A. He was.

Q. Of the Beverly Hills Police Department?

A. That is correct.

Q. What did you have to do with the identification work?

A. I am the fingerprint man. I took Mr. Smiley's fingerprints after he was arrested.

Q. Do you know Mr. Cox? A. I do.

Q. What was his position with the department at that time, if you know?

A. He was a desk officer, on the desk.

Q. And he took the questions and answers—that is, he questioned the prisoner and took the answers, and you took the fingerprints, is that it?

A. That is correct.

Mr. Tolin: You may cross-examine.

Cross-Examination

By Mr. Neeb:

Q. Mr. McIntire, just one or two questions. Your record that you have shows that he came in about 1:30 in the morning, doesn't it?

(Testimony of Morton L. McIntire.)

A. The record shows that he was arrested at that time.

Q. That would be the time of arrival at the station? A. No.

Q. Does your record show what time he arrived at the station? A. I am not sure.

Q. Pardon?

A. As to the exact time, I am not sure.

Q. Was it sometime after 1:30 in the morning?

A. No; it would be before then.

Q. Do your records also show that he was not held and was released without any charge against him, the following morning at 9:00 o'clock?

A. He was released, yes.

Q. About 9:00 o'clock the following day, is that right? A. That I don't know.

Q. Have you consulted your records before coming down here to testify? [126]

A. I would need the records to more or less prove when he was released.

Q. Do you have those with you?

A. That record that Mr.——

Mr. Neeb: That doesn't show.

Mr. Tolin: I will stipulate he was released in the forenoon on the following day.

The Witness: It shows on the back——

Mr. Neeb: On the back of the one you have?

The Witness: Yes.

Mr. Neeb: Let's see it.

The Clerk: Exhibit 7.

(Testimony of Morton L. McIntire.)

Mr. Neeb: All of this is not in evidence.

Mr. Tolin: It is just for identification. It may go in as far as I am concerned.

The Witness: I think on the back of the property receipt there is a time stamp showing when his property was released to him.

Q. (By Mr. Neeb): Is that a property receipt?

A. That's right. Here is the stamp (indicating).

Mr. Neeb: Can you read that?

Mr. Tolin: You had better ask him to read it.

Q. (By Mr. Neeb): Is that a stamp?

A. Here it is, here (indicating).

Q. Is that where they stamp it? [127]

A. That is correct.

Q. That is the back of this thing (indicating), isn't it? These are photostats, these are different pictures.

A. This here is the back—this is the property receipt, that is the reverse side of the property receipt.

Q. To refresh your recollection, would that give you the approximate time?

A. That is correct.

Q. What would that be?

A. It says 11:34 a.m.

Q. That was the next day?

A. That was on June 21st.

Mr. Neeb: I have nothing further.

The Court: Is that all from this witness, Mr. Tolin?

(Testimony of Morton L. McIntire.)

Mr. Tolin: That is all I have from this witness.

The Court: You may be excused.

(Witness excused.)

Mr. Tolin: If the Court please, I think I am about to rest, but I would like to check the exhibits first, if I may.

The Court: Very well.

Mr. Tolin: There is one thing for which we would have to recall a witness. Maybe we can work it out here.

(Counsel conferring together.)

Mr. Tolin: There will probably be a delay of three-quarters of an hour to get the witness, we haven't worked it [128] out, so I will rest without it.

The government rests.

The Court: Very well. The government rests.

Mr. Christensen: Well, we have some motions.

The Court: All right.

Mr. Christensen: And some legal arguments, your Honor.

If counsel will approach the bench, it might save time and help to formulate the program.

(A discussion was had at the bench without the hearing of the reporter and the jury.)

(Whereupon the proceedings were resumed within the hearing of the jury, as follows:)

The Court: The jury will be excused until 10:00 o'clock in the morning. You will bear in mind the court's admonition.

The court will stand in recess until 2:00 o'clock.

(Thereupon, at 11:45 o'clock a.m., a recess was taken until 2:00 o'clock p.m. of the same day.) [129]

July 13, 1949; 2:00 o'Clock P.M.

(The following proceedings were had without the presence and hearing of the jury:)

The Court: You may proceed.

Mr. Christensen: If the court please, we now make a motion at the conclusion of the prosecution's testimony to dismiss each and every count of the indictment on the ground that the evidence is insufficient to even prima facie-ly support the indictment or any count thereof.

I presume preliminarily it would not be amiss to observe that the evidence here discloses only in the instance of an arrest a violation of local, municipal and state laws with respect to gambling.

As to one he was acquitted of the charge and as to the other he was subsequently released. In another instance when he was interviewed by the Beverly Hills police department in connection with being held for a short period of time in connection with an investigation concerning the conduct and act of other persons—in short, when he was being held as a material witness in the Beverly Hills situation, it will be remembered that the record here discloses, only on the arrest slip, that he responded, according to Mr. Cox' testimony, to the question "Where were you born," "New York." "How long in the county—how long in the state?"

And of course obviously as to that count it wouldn't fit the statute at all which reads that there must be a false representation of citizenship when he is not a citizen either by reason of birth or by reason of naturalization.

I am not so much concerned about the point that I am making on that because it is so apparent. I would rather address myself to the basic subject matter.

Preliminarily at the outset I want to call attention to the fact that there was no question of citizenship—"Are you a citizen?"—like the instance of the forms used by the police department of Los Angeles and the sheriff's office.

We all know that there must be a representation of citizenship—an affirmative act.

The mere negative statement of birth does not in itself establish that. The burden would be on the government to show that there was an affirmative representation and claimed citizenship.

We know that at one time Indians, although native-born, were not citizens.

We also know that children of the Diplomatic Corps were not citizens. We also know that there is such a thing as repatriation in spite of the fact that one may be or had been a native-born citizen.

I only do that to clear up the Beverly Hills situation so we can get down to the essence of Counts 1 and 2 with [131] reference to an arrest card where he said he was a citizen, according to the testimony, and whether or not proof of that

fact alone would satisfy the requirements of the statute and support the allegations of the indictment.

Now, we know that being arrested for gambling, whether he said he was an Indian, Chinaman or anything else, he didn't avoid arrest because in the booking process he answered a question "Yes," to the question of whether he was a citizen.

I am going to deal with that phase of it, that it must be pertinent—that it must be material.

We further know that under the law that one is not obliged to even, when he is booked on an arrest, to give his address. That might be incriminatory in and of itself. He doesn't even have to give his name. He can padlock his lips. There is no obligation imposed upon the prisoner to answer anything. I mean that is academic. [132]

So the mere answer of a question in and of itself is not an affirmative assertion on his part.

We shall see in the cases that it delineates the types of situation in which citizenship when it is affirmatively claimed is significant.

We also know if he had disclosed himself to be a Canadian citizen, or a derivative citizenship might have existed on his part as a Canadian, that in the offense that he was charged he would be dealt with under the law precisely the same way as a citizen would be.

We further know that, while a police department, as an agency, desires all the statistical information it may get for police purposes, for exchange with

other police agencies, and it may be desirable from their point to do so, they are not authorized in law, they have no authority in law to inquire. To "inquire" means to compel.

Obviously, if one were seeking to gain something, then whether he was a Communist or something is different. Suppose it was on the arrest slip, "Are you a Communist?" there may be a law with reference to that subject-matter, and he said, "I am a Republican," it wouldn't make a particle of difference, if he was arrested on a gambling charge. But the moment he would come before the immigration authorities, like a deportation warrant, as we found in this case, then they had the right to inquire, and he was obliged to answer truthfully, and [133] if he hadn't, he would be subject to two things, a charge of perjury, as well as a false representation of citizenship, because it was material to that kind of an inquiry.

In short, when a local police officer arrests one on the highway, they may ask questions or they may see fit to ask questions, but that still doesn't mean that it is in furtherance of, and I quote the words, "in furtherance of official duty," and I shall comment upon that in connection with what our own circuit has said, and that it must be material. That is what the DePratu case holds.

It is not a moral turpitude offense; it is not an anti-social offense at all.

I say that if it is a busybody, and that is all you can say—and it cannot be distinguished, even, from a Gallup poll surveyor—certainly he has a

good reason to ask, he is curious, he is building up certain statistics, but that is a personal good reason. It might be a department personal good reason, as far as police administration is concerned, but it isn't one founded in law. So we must have in mind that while I have the lawful right to ask any of the gentlemen in this courtroom, "What was your income last year?" there is no obligation imposed upon them to answer that. But if the Internal Revenue gentleman asks them that question, that is a totally different situation, because that is in furtherance of his official authority and duty to so inquire, and imposes [134] upon me, then, the obligation to answer and to answer truthfully. And unless it falls in that classification, then it is nothing more than boastful or idleness, and you can tell them anything that you may see fit to tell them.

Because when the Internal Revenue man asks that, that is a legal right, as distinguished from any of us having a lawful right to ask anyone any kind of a question we desire to ask.

In other words, we do not have a moral turpitude or anti-social offense here.

May I just give your Honor one case that perhaps only touches how this type of offense is really evaluated by our courts. It isn't pertinent to the direct issue of whether there was sufficient proof here or not. I direct your Honor's attention to the case of *Frederick vs. United States*, 146 Fed. (2d) 488, a decision by the Circuit Court of Ap-

peals. This is simply designated in showing that it is not basically a moral turpitude or anti-social offense.

The court said in that case that although the indictment charging that defendant, quote, "falsely representing himself to be a citizen of the United States in applying for a poll tax receipt and in applying for a ballot to vote," end of quote, was supported by sufficient evidence, the appellate court said, quote, "The case is suggestive of a witch hunt . . .

"The case is affirmed, but without prejudice to the right of defendant to apply within thirty days of the receipt of the [135] mandate to the lower court for a suspension, or reduction, of sentence."

In that case the defendant was sentenced to 60 days in jail. But even in that case it was in connection with applying for a poll tax receipt and applying for a ballot to vote.

Of course, obviously there is a legal right to ask the question because the law will not permit one to vote who is not a citizen. So there you have a situation where it was pertinent.

When I go upstairs to the Radio Commissioner's office and I apply to be a radio operator, which I must to even operate the small radio set I have aboard my boat, I get a form; now I am seeking something there, your Honor, and when I answer the question, "Where were you born?" and then they follow it up beyond that, not only "Where were you born?" but following that, "Are you a

citizen?" in addition to that, there are three or four questions that they ask because they recognize one might, by reason of repatriation or other reasons, even though being a native-born, not be a citizen of the United States—there I am seeking something, I am looking for something. But if the guard downstairs as I am walking out should say, "Here, I want to talk to you a minute. Are you a citizen?" and if I were not a citizen, I would be perfectly under the law and within my rights, without violating the law, to answer, "Yes," because it is pertinent to nothing, it is [136] material to nothing, and it must be under those circumstances that it is made.

The statute says "represent," which is synonymous with making a claim to citizenship. That is when you go for a license like I just explained, or if you should ask for a liquor license, like in the DePratu case, obviously, since the law requires one to be a citizen before such a license may be issued, the moment he makes that false claim he then gains and obtains something that he is not entitled to.

Now, your Honor, let us find out, really, what we have here to consider, and I say that in the light of the fact that I noticed in counsel's memorandum that he filed with your Honor that he says the law has been settled by Judge Beaumont who heard arguments on the motion to dismiss. Well, that is a decided inaccuracy. I call your Honor's attention, for instance, to the evolution of these indictments, and we finally get up to the point where we

have the allegations that are contained now in this final indictment. In the first indictment, 19778, the charge was that the defendant “did knowingly, willfully, and feloniously represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship.”

Now, the statute says that he must falsely represent himself to be a citizen of the United States.

By judicial interpretation two circuits have held that, [137] in spite of the fact that the word “fraudulent” was dropped, and a slight recomposing of the language of the statute, that “false” means precisely when you go to represent yourself falsely that you then, in order to violate the law, do so with an intent to defraud. [138]

Some demurrers have been sustained in other districts for failure to show a fraudulent purpose. Now, I am not raising that point here at this time.

But you see they omitted even the word “falsely” and had to amend that indictment and then they came forth with 19926. In that one they charge that he knowingly, willfully, fraudulently, unlawfully and feloniously represented himself to be a citizen.

Now, that might have been good on the interpretation of the word “fraudulently” as being synonymous with “falsely,” but in any event the prosecution elected to again amend its indictment to conform to, perhaps, some of the decisions and then produced the indictment we are here on now before this court. That is 20069.

This one reads:

“Did knowingly, willfully, falsely and fraudulently represent to Cox, an employee of the police department,” and so on, and then with the added words describing Cox as being “a person having a good reason to inquire into the nationality status of the defendant.”

Of course that doesn't mean any idle or boastful reason, but it means, as I have described, a legal reason. It goes on beyond being merely a lawful reason.

Now, we argued the question that a fraudulent purpose [139] was not set forth in the indictment. Counsel countered and said in the *United States vs. Prevost*, a decision by our own Circuit Court of Appeals where the indictment was couched in the precise language of the statute, that that indictment was sufficient to put the defendant on notice.

The argument was made that:

“If that is good certainly when we have embellished it further that should suffice here and we even use the word ‘fraudulent.’ ”

So the form of the indictment, but not the ultimate issue that it had to be material—that was a matter of proof and fact to the particular inquiry and of course that court could not pass upon it.

I refer for instance to what his Honor Judge Beaumont said to indicate that that is precisely what occurred.

So the law has not been settled and we are in a totally different position here in discussing this

motion because there is now presented an absence of proof on these essential and cardinal allegations in the indictment and necessary allegations.

On page 22 Judge Beaumont said:

“Mr. Tolin, your position is that you have followed the wording of the statute in this case.

“Mr. Tolin: Yes, your Honor.

“The Court: Now, does it say a good reason to [140] inquire or an adequate reason?

“Mr. Tolin: The statute reads thus:

‘Intentionally to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship or without otherwise being a citizen of the United States.’”

Intentionally to falsely represent himself.

“Mr. Christensen: It is the word ‘falsely’ that has been indicated by two Circuit Courts of Appeals to mean for a fraudulent purpose. That is the element that is lacking here and which we urge should be.

“The Court: This opinion held that where it is stated that a defendant intentionally and falsely did assert that that is equivalent to saying that it was done for a fraudulent purpose.”

Then I raised the question:

“But they didn’t plead facts to support that allegation.”

So we have purely a holding, as far as the law in this case is concerned, that the indictment as to form and substance was sufficient.

Now, have they filled the shoe of the indictment?

And that is what I am addressing myself to at this phase of the [141] proceeding.

I am going to take first the De Pratu case, which is the last one by our Circuit Court of Appeals.

While we have read that statute I would like to read it again. It is only three lines. That reads:

“Knowingly to falsely represent.”

There is a vast distinction between an affirmative representation and purely an answer to a question such as was asked here by an arresting police officer under the circumstances of booking the defendant and to which the defendant need make no reply.

“Knowingly to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship or without otherwise being a citizen of the United States.”

Now, let us see what our latest decision is. They attack first the sufficiency of the indictment and secondly the sufficiency of the evidence.

The indictment in that case charged the language of the statute, that:

“He knowingly, falsely and feloniously represented himself to be a citizen when he was not,” and in the one count after that language the court goes on to say: “Each of the counts charges the appellant on a stated date so made the false statement [143] of citizenship in an application for a retail liquor license filed with the Montana Liquor Control Board by answering ‘Yes’ to the question ‘Are you a citizen of the United States?’, when appellant was not, and well knew he was not, such a citizen.”

That is in the first two counts and the third count:

“That the appellant so made the false statement of citizenship on September 11, 1946 before a board of special inquiry of the Immigration and Naturalization Service of the United States when, as a witness, he testified that ‘I acquired United States citizenship through my father who naturalized in the United States when I was a minor,’ in answer to the question ‘Of what country are you now a citizen?’, when appellant was not, and well knew he was not, such a citizen.”

In other words, he affirmatively comes forth as a witness and under oath states certain things, while here we have nothing under oath, except when he was under oath and told the truth to Mr. Hamilton of the Immigration Service, which was actually at a time prior to the time of, I think, two arrest slips in this case—yes, prior to the time of two arrest slips in this case.

He testified, again, “I acquired United States citizenship [143] through my father who naturalized in the United States when I was a minor.” He made that answer to the question, “Of what country are you now a citizen, when appellant was not, and well knew that he was not, such a citizen.”

Now, then, on the attack as to the sufficiency of the indictment the court said:

“The attack upon the sufficiency of the indictment is based upon asserted necessity for allega-

tion and proof of fraudulent purpose in the making of the false claim of citizenship.”

The court there held that the statute under which this indictment was laid does not by implication or otherwise condition the outlawed offense upon the alleged existence of fraudulent purpose in the mind of the one making false claim of citizenship.

Now actually as to the phase whether the proof would require fraudulent purpose is pure dictum because that was not before the court. But as to the lack of need to affirmatively plead, as some of the other courts have held, that of course is a direct, decisive point and was before the court.

I am making no contention here at all on the question of pleading a fraudulent purpose. But there are other cases, and we will note that this case can be actually reconciled in spite of those few words, with the *Achtner* case and the case, one from the Second Court of Appeals and the [144] other from the Seventh Court of Appeals, which I will come to in a moment because of the next question, and that is the one we really have here before us—whether or not this was pertinent to any inquiry at all.

Now, here is what our Appellate Court said:

“Appellant also contends in effect that the charges and proof do not sufficiently show that his claims of United States citizenship were material to the transactions at hand and were not mere boastful or jesting assertions”—were not material to the transactions at hand.

Let us see what the Appellate Court said:

“But the first two counts charge and the undisputed evidence establishes that the allegedly false claims of citizenship were made in appellant’s applications for a Montana liquor license filed with the Montana Liquor Control Board. At the time of such filing, no one but a citizen was eligible for a liquor license under Montana law.”

In other words, it was material and it was pertinent.

“The third count charges and the supporting evidence indicates that the allegedly false claim of citizenship was made by appellant as a witness before a board of special inquiry of the Immigration and Naturalization Service. The evidence [145] further discloses that while so appearing before the board, appellant was testifying in aid of another alien’s application for admission to this country to become an employee in appellant’s business.

“In each instance, the inquiry as to citizenship was made by public officers in furtherance of their official duty and authority.”

Obviously it must have been in furtherance of their official authority because he couldn’t get a license in the first place unless he was a citizen. They only issued as, if and when the man is a citizen and you can’t support the other phase of naturalization unless you too are a citizen.

“Obviously, appellant’s claim of United States citizenship in response to such inquiry could not be said to have been made as ‘a mere boast or jest or to stop the prying of some busybody.’ ”

That meets the requirements of United States vs. Achtner. And so far as the defendant's rights are concerned or, rather, a prisoner's rights are concerned or anyone arrested, the police officers, when they go into inquiring under a condition of arrest it is nothing but precisely a situation of prying into somebody's business by some busy-body.

They follow the Achtner case here, your Honor. You will [146] observe that on the question of materiality. Now, we know that it wasn't material in this case. We know it wasn't pertinent to any arrest. The most you can say is that they wanted police information.

We also know too, your Honor, that when a man is arrested we know something of the practices. We have it before this court, and that is if the prisoner exercises not only his lawful rights but his legal rights and declines to be fingerprinted or declines to state his name and address—well, of course they book him and can hold him on suspicion for 72 hours and they usually cool him off by sending him into a cell and keeping him there until he is ready and willing to be cooperative in answering questions. In other words, his booking will not be completed and his bail set unless he does so and we know there is always the intimidation when that police officer takes you by the shoulder and marches you into a booking office.

There is a semblance of duress there and when they say here: "What is your name?" "We are booking you," and take your money, there is no

affirmative movement upon the part of any prisoner to say: "I want to say this, I want to say the other thing," but you always have the hand of compulsion. But, regardless of that, we do know that it wasn't pertinent anymore than if they were interested in one's religion, one's income, the number of children he has—interesting statistical [147] things, yes, maybe for social welfare work. But the individual and the residence or the age, be he citizen or not, he is under no such obligation to answer under those circumstances. He would be before the immigration authorities. He would in a registration where somebody has the legal right to inquire. Now, the Achnert case—let me see. Now, we know that in the De Pratu case in determining the question of pertinency and materiality it follows the Achnert case and that is by, I think, Judge Hand, of the Second Circuit Court of Appeals—no, I am mistaken. It is by Circuit Judge Clark with Hand, Swan and Clark sitting.

In that case he was charged with falsely representing himself to be a citizen when he was not and he pleaded guilty. Then he made a motion for permission to withdraw the plea of guilty and the court denied that motion. He wanted leave to change that plea.

He asked that privilege on the ground that no offense against the United States had been charged and consequently in this case we get into the question of when you may change a plea. I think the

rules have been somewhat modified since that time, but that of course isn't pertinent here.

Counsel has cited some phases of it and it is worthwhile reading the revised or amended section because it is now going to deal with the introduction into the statute of the word "falsely" and its significance and the elimination [148] of the word "fraudulent."

The statute, 8 U.S.C.A., Section 746(a), sets out in 34 numbered subdivisions at least that number of separate offenses related in some way to naturalization proceedings, citizenship status, and the control of aliens in this country.

It represents for the most part a codification in one place in the Nationality Act of 1940 of offenses formerly scattered in various places.

Subdivision (18), with which we are immediately concerned, makes it a felony for any alien "knowingly to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States."

Then quoting the statute:

"This subdivision is a substantial reenactment of the repealed 18 U.S.C.A., Section 141, originally passed in 1870, which, under the heading, 'falsely claiming citizenship,' made liable to fine and imprisonment any person who 'for any fraudulent purpose whatever, shall falsely represent himself to be a citizen of the United States without having been duly admitted to citizenship.' " [149] Thus,

the only pertinent difference between the definitions of the two sections is that the present statute has substituted the words 'knowingly to falsely represent' in the place of the prior representation 'for any fraudulent purpose whatever.' Significant also is the increase in the penalty by the later legislation from a maximum of \$1,000 fine and two years' imprisonment to a \$5,000 fine and five years' imprisonment.

"The first and most important question with which we are presented concerns the sufficiency of the indictment, which, as we have seen, does little more than reiterate the language of the statute. We are no longer bound by ancient and antiquated rules" and so on.

Then they proceed to analyze whether or not the language of the statute is sufficient to put the defendant on notice and they hold that it is. So there they sustained the indictment. But the court proceeds:

"As defendant here does not, as well as he could not, claim to have been prejudiced in his defense or placed in danger of double jeopardy, the indictment must, therefore, stand against any objection to merely its generality of allegation. So that question is out of the way. Then the court proceeds: [150]

"Under this statute no imitation was placed upon the circumstances under which and the person to whom the false representation was made as long as it was for a fraudulent purpose."

And that is referring to the originate statute.

“Included among such purposes, according to the precedents are the securing of registration as a voter, the obtaining of a passport and, it seems, the gaining of entry into the United States.”

And then they proceed:

“And the intent of Congress in October, 1940, when Section 141 was replaced by Section 746, was quite obviously to extend, rather than to reduce, the coverage, as well as the penalties, of the prior law, for the latter statute was part of the Nationality Act of 1940, a national defense measure enacted in the face of the impending war to help tighten controls over the conduct of aliens in this country.”

Now, the court proceeds:

“This conclusion disposes also of defendant’s cognate contention that the prohibited representation must be made to the government or one of its agencies [151] and cannot be made to a private individual in a private capacity.”

That, of course, was never contended nor was it an argument at any time.

There is no question whatsoever about an employer who may for security reasons or even for a matter of plant efficiency desire certain information. So if you seek employment from someone, that someone has a right—he has not only the lawful but he has the legal right to ask the questions and get honest answers because if you don’t give him an honest answer then you are guilty of deception and it is the deception that is struck at because if it isn’t deception it is not pertinent.

But if you do say you are a citizen and you are not, he may place you in a category that he would not if he knew that you were not a citizen.

Then on the other hand he may, so far as the efficiency experts are concerned or the psychiatrists of the plant, have taken a different position. In other words, he is entitled to know. You are entitled to know, I would assume, if one seeks a position perhaps where one is a member of a type of union that an employer might believe was not compatible with his operations—a municipality may even ask: “Are you or have you ever been a member of the Communist Party?” And it may even go so far that if it is required to be made under oath [152] that therefore it might even be perjury. In fact, it would if they had the legal right to ask that question.

A municipality has the same right in employing policemen, and so has the private employer the right to inquire and a right to truthful answers.

So, they sweep away the contention that it is only a governmental agency. Of course, we make no such contention here and never have. So they proceed:

“As we have seen, the history of the legislation definitely implies the contrary, and we see no ground for the weakening of the statute by the construction thus urged. Nor is there any basis for its claimed unconstitutionality, since the Congress has ample power to impose a regulation of this kind upon the conduct of aliens in this country.

But we agree with the District Court that the representation of citizenship must still be made to a person having some right to inquire or adequate reason for ascertaining a defendant's citizenship; it is not to be assumed that so severe a penalty is intended for words spoken as a mere boast or jest or to stop the prying of some busybody, and the use of the words 'knowingly' and 'falsely' implies otherwise. Thus, it is said that the word 'falsely' particularly in a [153] criminal statute, suggests something more than a mere untruth and includes 'perfidiously' or 'treacherously' or 'with intent to defraud' as has been held with respect to the counterfeiting laws."

Now, that is the case cited by our Circuit Court in the De Prato case and they hold that, brushing aside the contention there that it was material and pertinent, but we say here it was not material or pertinent to any such issue.

There is a very interesting opinion, your Honor, as to when one has these legal rights to inquire.

While it was not this type of a case, it involved where the one agency who did not apparently have jurisdiction over the particular matter did make some inquiries. It is an opinion that we have been using around here, by our federal judge, Judge Pierson Hall, in the case of United States vs. Steve White and A. C. Dunham, Case No. 18944, and it contains some very apt language. I just borrowed this from the judge's secretary, and rather than state the substance of how the question came up, I

think he does that much better than I could in this written opinion. He says:

“The term ‘jurisdiction’ as used in Section 80 is, of course, a different term than ‘jurisdiction’ as used in connection with courts. The word ‘jurisdiction’ is synonymous with the word ‘power,’ that is, the power to act. I think as it is used in Section 80 and as it is used in Title 8, conferring upon the Department of Justice ‘jurisdiction’ concerning aliens and the matter of naturalization and the like, it means, as among the different agencies and departments of the Government, that the Department of Justice, and no other department, shall have power to investigate and to do the other things required or permitted of it by Title 8. That is to say, the Department of the Interior could not go out and investigate or make arrests or hold hearings concerning the matter of aliens, [155] nor could the Treasury Department or the Department of Agriculture, or the Navy Department, nor any other department. So, as between the different agencies of the Government, I think that term as used means that jurisdiction is the power of that particular agency to administer and enforce the law.

“That points up the proposition that the deception which is condemned by the statute—and deception is what the statute condemns—must be practiced upon the particular department or agency involved. For instance, if a person would make a statement to the Department of the Interior concerning his alienage or the date of his birth or

the fact that he arrived in the country on a certain date, or something like that, although he might commit a violation of the law with relation to some Act that the Department of the Interior was charged with enforcing, I certainly do not think that would be such a deception as would carve out the crime of deceiving the Department of Justice within the concept of the term as used in Section 80.

“I do not think the statute can be stretched to cover a deception of a state police officer or any state agency or of an individual person in connection with the administration or enforcement of any of the laws of the Government of the United States. If it can [156] be stretched to cover deception that is practiced upon a state policeman, then it can be stretched to cover any deception or false statement made, for instance to an inquisitive neighbor or friend or business associate concerning your citizenship, or your income, or any of the almost innumerable facts of life which are now regulated by—and thus within the ‘jurisdiction’ of some department or agency of the Government.

“For instance, if in a conversation with a brother lawyer one should deliberately misstate his income for last year, one would be guilty of a crime because the investigation of violations of the income tax law is under the ‘jurisdiction’ of the Bureau of Internal Revenue. And you can carry it further. You can get it down to where if one lied to a neighbor or friend about one’s age, or actual residence on a particular street, it would be a crime for making a

false statement in connection with a matter within the 'jurisdiction' of some department of the Government, because certain agencies of the Government are charged with enforcement of the Selective Training and Service Act, and the age and residence of male persons are material facts in connection with the administration of that law. Examples can be multiplied."

We say it is not pertinent and it is not material.

Let's assume one of our agricultural inspectors under the Agricultural Department of the United States, whose duty it is to survey pest control, to ascertain whether or not the Mediterranean fly is floating around in certain districts, and he finds one that looks rather rugged, badly beaten down, he is making his inspection and he talks to a farmer at the time, and the farmer, maybe, looks like an alien or something, and he asks him, "Are you a citizen of the United States?"—if he answered, "Yes," what difference would it make as to whether the bugs could be controlled and to condemn the pest situation in that particular area?

It is not making an affirmative claim.

And that illustration is just as apt as when Mr. Smiley was arrested for gambling, shooting dice, and it made absolutely no difference and it wasn't pertinent at all.

And the De Pratu case does say that it must be in furtherance of an official authority and duty. "In furtherance of an official authority"—and the word "authority" is very significant there—"and duty."

It implies the power to do so, just as Judge Hall has mentioned in this decision. And they lacked the official power in this instance to make that kind of an inquiry. And when he was obliged to do it with those that did have that authority and that power, then he answered truthfully each time. And I submit, your Honor, that the evidence here is wholly lacking in supporting the [158] cardinal allegations of this indictment, that he wilfully, falsely, and fraudulently represented himself to be a citizen of the United States, and the motion should be granted.

Mr. Tolin: I have a rather long memorandum on this point. I don't know if it was filed early enough and the court has had an opportunity to read it, but referring to that memorandum there are a few things that were suggested by counsel's argument that might be treated here briefly.

He made some point that the defendant Smiley when he was in the various police and sheriff's stations was not gaining anything by any statement that he made; that his statement was one which was made merely to satisfy the Police Department, and not for any advantage that might accrue to Smiley.

We know from this evidence, that is, the evidence in this case, that Smiley was an alien. We know from the testimony of Lieutenant Cunningham of the Los Angeles Police Department that whenever an alien is arrested and admits his alienage upon the inquiry, it becomes a part of their record, or

when the department has reason to believe that the arrestee is an alien, that they call—that is, the Police Department calls the Immigration Service and tells them about it, that they have arrested that man, and for what. So that the department of the government which has jurisdiction over matters of deportation, naturalization, and other alien control matters, is placed upon notice. [159]

I do not know whether Mr. Christensen is right that a man standing in the booking office of a police station after being arrested has a right to not answer any questions. But if he has and does answer them, if he has a right not to answer but he elects to answer, it would seem that he would be in the parallel position of a defendant in a criminal case who has no duty to testify but who elects to testify. When he does undertake to testify he is obligated to tell the truth, otherwise he is subject to the prosecution which follows for perjury. And if this man in the booking office elected to answer questions, then he is liable to answer them correctly, at least to answer them free from misleading deliberate falsehood.

And had Mr. Smiley, according to the evidence here, had a matter pending before the Immigration Service, they were interested in him, they had a deportation warrant, or something of the sort, out for him—had they got a telephone call from Mr. Cunningham, as according to Cunningham's testimony they would have received one, had Mr. Smiley said that he was an alien, then that agency which

did have a proceeding which might have resulted in deportation, that agency would have been alerted to the fact that this man was in trouble with the Police Department, at least that a charge had been brought against him, he was there at the jail, or he had been unless he made bail, and when the defendant stood up to [160] the booking officer and said, "I was born in New York, I have lived here all my life, I am a citizen of the United States,"—by that fact he procured whatever advantage there is in not having the Police Department report him to the immigration authorities for whatever use the immigration authorities would desire to make of the information that Smiley was in trouble because of the gambling laws or was under questioning and was held in connection with a murder, or something of that character. I think it might be a very substantial advantage to one who is the subject of inquiry with respect to his right to be in the country, to not have the immigration authorities get a phone call from the Police Department saying, "We have a booking down here by the name of Smiley who is an alien."

Although Smiley was there before the Immigration Service, he was there upon his representations, and they did not include, of course, the matters respecting which he had been arrested by the Los Angeles Police Department.

Petition of Ledo in 67 Fed. Supp. 917 was a case——

Mr. Christensen: What was that?

Mr. Tolin: 67 Fed. Supp. 917. That was a case in which a false claim of citizenship was made in one instance to a union. That is, one of these long-shoremen's unions, Local 1329. Whether A. F. of L. or C.I.O. doesn't appear, but in any event it was a union. You had to be a citizen in order to hold a certain position, elected position in the union, [161] and one of the statements of citizenship was supposedly made to that union, then there was another one that was made in this way:

“Q. Did you ever claim to be a citizen of the United States for any reason?”

There are questions before the Immigrant Inspector, and the matter arose upon an application for citizenship, which was denied.

“Q. Did you ever claim to be a citizen of the United States for any reason?

“A. Yes, I did down to Quonset.

“Q. Now, in regards to your having claimed American citizenship at Quonset, as you have previously testified. Will you explain more fully?

“A. Well, when you sign the papers you got to state where you were born and so forth.

“Q. And what did you do?

“A. I just wrote down ‘Born in New Bedford, January 16, 1894.’

“Q. Did you ever claim to having been naturalized at New Bedford, Massachusetts, in 1926?

“A. Yes, I forgot that, that's right.

“Q. You admit having claimed American citizenship on those two occasions?

“A. That’s right. [162]

“Q. Will you explain to me the circumstances under which you made those claims?

“A. I wanted an interview with Mr. ———, the officials of Merritt, Chapman and Scott, they are the contracting stevedores for the Navy. * * *

“Q. And what was your purpose in claiming American citizenship at that time?

“A. So I wouldn’t have no troubles getting in.”

Then it appears he wouldn’t have trouble getting through the gate to get up into the navy yard to talk to these contractors.

That man was obtaining an advantage, he was getting through a gate, he was getting access to certain officials of this operating company, these contractors, I suppose so he could apply for a job. Anyway, he was getting access there by claiming to be a citizen.

Smiley, on the other hand, was gaining the advantage of not having it brought to the attention of a federal agency, which was investigating his right to remain in the country, that he was in trouble with the local police over gambling.

I think that was a fraudulent purpose he had in mind. It certainly resulted in the failure of the Immigration Service to get that call from Lieutenant Cunningham, or Lieutenant Cunningham’s subordinates.

Now, concerning the test by which a person in-

quires into the nationality status of a person. We have not pleaded here [163] as generously as counsel suggests. The language of the indictment says, with reference to Thomas A. Cox, "being a person having good reason to inquire into the nationality status of the defendant." Not that he had any duty with respect to the nationality laws, or that he was even under any mandate of the duty of his office to inquire, but one having good reason to inquire.

Your Honor heard the testimony of Mr. Hood this morning, and your Honor knows of the statutes under which the Federal Bureau of Investigation maintains that central indexing of identification data in Washington, D. C., and how appropriations are made by Congress after Congress to the operation of that department, so that any police office throughout the United States may telegraph in to the Federal Bureau of Investigation and receive from them that identification data; that the Federal Bureau of Investigation makes certain references of information to the Immigration Service, and there is an exchange between the police departments, they sending in information and the Bureau sending back information, each providing the other in their correlation of identification data.

The law contemplates, certainly, that when a large central identification bureau is set up, such as the F.B.I. has in Washington, with the power of the Bureau to send out reports, to provide blank forms to the local police departments [164]

by which fingerprints and the other accompanying identification data is forwarded into the Bureau, it must be contemplated by those who frame a law that sets up that machinery, that the machinery is going to be used, that it is going to operate, that officers are not going to stop at taking the fingerprints, but that they are going to get the answers to the other questions, as well, and an officer, therefore, has a good reason to inquire.

I don't know, and I don't think it is necessary to answer here Mr. Christensen's theory that a man at the booking office can stand mute and not even give an answer as to his name, and can refuse to have his fingerprints taken. I don't know what the answer to that might ultimately be. I think Mr. Christensen is wrong, at least, in part of it. But when that man at the booking office does give the information, he takes the obligation to give it truthfully, and when he makes a positive assertion, gains the advantages which I have stated and illustrated to the court, he takes the duty to give true information.

Counsel has talked a lot here about fraud, and it is true that the indictment does, along with the general evidence that accompanied these allegations, say that the statement was fraudulently made. I think the evidence of Cunnigham and Hood——

The Court: It doesn't say "fraudulently made," does it? [165] It says "falsely made."

Mr. Christensen: Falsely and fraudulently.

Mr. Tolin: The indictment says "fraudulently."

That is surplusage. That indictment was drawn before the decision came down in the De Pratu case which says it isn't necessary. The De Pratu case says this about fraud. It says:

“The attack upon the sufficiency of the indictment is based upon asserted necessity for allegation and proof of fraudulent purpose in the making of the false claim of citizenship. The present statute does not expressly so provide, and from a reading of it it readily appears, contrary to appellant's contention, that Section 746 (a) (18), Title 8 U. S. Code, under which this indictment was laid, does not by implication or otherwise condition the outlawed offense upon the alleged existence of fraudulent purpose in the mind of the one making false claim of citizenship, although that fraudulent purpose was a necessary ingredient of the similar offense under the previous law which was superseded by said Section 746 (a) (18). We find no error in the trial court's refusal to dismiss any count of the indictment for failure to allege fraudulent purpose or for any other reason.”

Then, in that earlier case of *United States v. Achtner*, which is cited in our memorandum, the elements of the offense [166] are set out. It says:

“The indictment here charged that on or about October 8, 1941, defendant, Wolfgang T. Achtner, being an alien never naturalized as a citizen, ‘unlawfully, willfully and knowingly did falsely represent himself to E. L. Kenney of the Ebasco Services, Inc., 2 Rector Street, New York City,’ to be a

naturalized citizen of the United States, in violation of 8 U.S.C.A., Section 746 (a) (18), which was expressly cited.”

Then it gives the history of the arraignment, and so on.

“Thereafter, on February 2, 1944, he moved for an order permitting him to change his plea to ‘not guilty’ and to quash the indictment as insufficient on its face. The court denied the motion, however, in a considered opinion and sentenced defendant to imprisonment for three years. This appeal attacks the judgment of conviction and the denial of the motion to quash the indictment and change the plea of ‘guilty’ on the ground that no offense against the United States has been charged.

“The statute, 8 U.S.C.A., Section 746 (a), sets out in thirty-four numbered subdivisions at least that number of separate offenses related in some way to naturalization proceedings, citizenship status, and [167] the control of aliens in this country. It represents for the most part a codification in one place in the Nationality Act of 1940 of offenses formerly scattered in various places. Subdivision (18), with which we are immediately concerned, makes it a felony for any alien ‘knowingly to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States.’ [168]

“This subdivision is a substantial reenactment of the repealed 18 U.S.C.A., Section 141 which,

under the heading 'falsely claiming citizenship,' made liable to fine and imprisonment any person who 'for any fraudulent purpose whatsoever, shall falsely represent himself to be a citizen of the United States without having been duly admitted to citizenship.'

"Thus, the only pertinent difference between the definitions of the two sections is that the present statute has substituted the words 'knowingly to falsely represent' in the place of the prior representation 'for any fraudulent purpose whatever.' Significant also is the increase in the penalty by the later legislation from a maximum of \$1000 fine and two years' imprisonment to a \$5000 fine and five years' imprisonment."

Mr. Christensen: Doesn't the opinion go on and say it must be with an intent to defraud? Don't they interpret the word "falsely" there?

Mr. Tolin: Mr. Christensen, I think you will have an opportunity for rebuttal but I will read the next paragraph if you would like to have it read. It doesn't go into that matter at all. It says:

"The first and most important questions *with we* are presented concerns the sufficiency of the indictment, which, as we have seen, does little [169] more than reiterate the language of the statute. We are no longer bound by ancient and antiquated rules of common law criminal pleading, and can now consider the adequacy of indictments on the basis of practical, as opposed to technical, considerations."

That is all copied out of the opinion.

Mr. Christensen: I see. All right.

Mr. Tolin: And you may use the one from our library.

Mr. Christensen: I have it here.

Mr. Tolin: I think those cases, your Honor, considered in the light of the evidence of the witnesses from the Federal Bureau of Investigation and of the police department—the Immigration Service, showing how they correlate this information indicates that there is no question but what a case has been made out and the defendant should be put to his defense.

The Court: What do you think about Count No. 1? Do you think the allegation as to citizenship is proved by proof that the defendant made a statement that he was born in the United States?

Mr. Tolin: At the outset of this trial I didn't know whether that count was going to be made out or not because under the Warazower case, which your Honor has no doubt read, we have to show, if we are relying on the admissions of the [170] defendant that he is not a citizen of the United States, we have to show that they were made prior to the commission of the offense.

I take it that is what your Honor has in mind and the statement as to Mr. Siu was made prior to that time.

Now, the Warazower case says unless corroborated, and I think corroboration is explained in this instance—that is, you can't rely upon the mere statement of the defendant unless corroborated.

It is corroborated by the fact that he repeatedly made the statement. He made it under circumstances which made it good as to the count and he made it under circumstances which made it good as to Counts 2 and 3 and therefore we don't have the jeopardy of its being treated as a confession and when I offered in evidence here this morning the statement that he made to the Immigration Service on that subject, first counsel objected to it and I undertook to withdraw one of the documents because there had been the objection of materiality, and I thought, well, maybe as to that Siu count there might be a question, so as I said, I started to withdraw it and then Mr. Christensen said he would withdraw his objection and consequently it is in without objection entirely.

It practically amounts to a confession so I think Count 1 is good. I think that is the only one which there might be any substantial question about. [171]

I realize there is a question on that but I thought the question is one which we can well resolve in favor of the government.

Mr. Christensen: If your Honor please, I don't know but what your Honor had in mind the Beverly Hills count.

The Court: I said Count 1. I didn't say "Beverly Hills."

Mr. Christensen: I mean the one with reference to Beverly Hills.

The Court: The Beverly Hills booking.

Mr. Christensen: I don't know whether that is

Count 1 or not, your Honor. That is not the Siu situation; that is Cox.

The Court: That is Cox.

Mr. Christensen: Yes, he testified he asked him when he was born.

The Court: Born in New York. That is all he stated.

Mr. Tolin: I misunderstood what your Honor had in mind. The case which I have handed Mr. Christensen, the one in which the petition of Ledo from which we read—in that case the court found—you have to read the whole opinion in order to get it because it reads as if it were an opinion given from the bench and perhaps not pulled together into succinct paragraphs that courts will do when they edit and give it out as a published opinion.

It is a District Court opinion, however, but in it the [172] court concludes that the statement that a man was born in New Bedford, had been there all of his life is a statement that he is a citizen. [173]

The Court: And he stated upon further examination that he had applied for citizenship at New Bedford. That was the way I understood it.

Mr. Tolin: I think that was the basis of the court's finding of a second false statement.

The Court: I haven't read the case; I heard you gentlemen read from it.

Mr. Tolin: Then with respect to that Count 2, your Honor, after he had stated to Mr. Siu that he had been in the United States all his life, which would mean that he would be a citizen unless he

was a child of some diplomat, and I think Mr. Christensen suggested that that was at least a legal possibility in these cases, that would put him in the class of those defendants who having peculiar knowledge of an exception have to prove the exception rather than the government negating the exception.

So, unless he is the child of some diplomat who was here in the diplomatic service, he could not have been born in the State of New York and be in this country all his life without being a United States citizen.

Of course, there is the other exception that he might have gone somewhere and renounced his citizenship but that too would be a matter peculiarly within his own knowledge and would be a matter of affirmative proof.

Mr. Christensen: The Ledo case is utterly and completely [174] of no relationship to the problems that I have discussed.

There it was the contention of the government that the petitioner—it was a petition for naturalization and based upon the fact that he had falsely, in connection with trying to, I believe, get into a union so that he could easier have contact, that he falsely claimed to be a citizen and also that he had falsely stated that he had been naturalized. It doesn't involve any element at all—it was purely a matter of discretion there of whether or not they were going to deny his petition. The barn door was wide open. It is not narrowed down like in a

criminal case and it is utterly nonapplicable to the situation that we have here.

A terrifically significant thing here, your Honor, is that we have noticed that counsel by-passed completely the fact that in our Circuit Court here they hold that pertinency and materiality is important. They discuss the whole phase of why it doesn't fit the *Achtner* case. The *Achtner* case wouldn't apply in that in this case for an application for a liquor license and supporting another man's citizenship then a false statement with reference to citizenship was vitally pertinent and material. And I say that there isn't the slightest answer by counsel as to whether it was pertinent and material in connection with his arrest.

He moves off into the most amazing argument I have heard, your Honor, that because you have a central agency gathering [175] information that he hasn't the right either as a resident or citizen, to capture heavy advantage when he may be arrested; that he must expose himself so that he can be arrested by some other agency.

The law imposes no such duty at all. We do know that our law protects the citizen. We do know that there is something in the Constitution and the amazing thesis that I have heard here that because a central agency of a police department should get this information and he gains the advantage so another one may not arrest him—that he should come forth and answer such questions truthfully—you might just as well say that is a

private detective agency were saying, "Well, we supply this information because when we do we are in a better shape with the police department—we might curry some favors," and so he gained an advantage by even lying to a Gallup Poll surveyor or investigator.

That isn't what we are aiming at here, your Honor. We are aiming at something that is perfidious and something that is treacherous. That is in the precise language of the Achtner case. The word "false" means more than a mere untruth.

The most you can say of it is it is a mere untruth to a police officer who in and of himself had no right, legal right, to so inquire and it doesn't fit the pattern of the shoe of our own Circuit which says that that inquiry must be [176] in furtherance of his official authority and duty.

There is no answer to that at all. And I say, your Honor, that it doesn't—that he has absolutely the right under those circumstances to say anything he wants. There isn't any evidence of deception here at all before the Immigration Department. Who did he deceive? The officer who was after an accumulation of statistics or data, carrying out a universal policy *policy* and because he didn't co-operate and fit into the picture and the mechanics of police administration counsel argues therefore that he gained an advantage and he should have told the truth.

I say, your Honor, that it doesn't fit the Achtner case and it doesn't fit the De Pratu case in any

sense and it is an amazing argument and I think an un-American argument.

Mr. Tolin: Counsel apparently didn't get the portion of my argument which was that inasmuch as the police department is under an obligation and custom to refer to the Immigration Department information on all persons who are aliens and who are arrested, that Mr. Smiley, who had a case, a deportation case pending in the Immigration Office, already gained the advantage of not having the police department call up and say that Smiley was there charged with bookmaking and that was an advantage. It kept the police department from giving the Immigration Service that which the Immigration Service was entitled to receive and the police department under obligation [177] to furnish. And if Smiley didn't want to give that information he could have used the classical answer of those who don't want to answer by saying or refusing to answer the question upon the ground that the answer might tend to incriminate him. He didn't do that. He went forward and affirmatively lied about it.

Mr. Christensen: Obligation? Listen to that, obligation. It is the obligation of the police department to give that information. It was the obligation of the police department and the custom to give that information to the Immigration Department and the Immigration Department was entitled to receive it. For heaven's sake, the police department could thumb its nose if it wished to the Immigration Department. It could say—supposing it had dis-

covered Communists. The police department was under no obligation to give that information to the Immigration Department and the Immigration Department was not in position, legally, to demand that information. In other words, if we reduce the offense under this statute because of a comity between agencies, and that is where we are finally reducing our position to simply because whether you might have comity with any kind of agency you might say "Well, now, that is nice, we will call them up. Now we may serve a warrant a little bit earlier," but that didn't even exist as to some of these counts because the Immigration Department already had had him before them and [178] he testified as to who and what he was.

We have counts in this that actually are subsequent to that. Why should those counts be in here even if that kind of thesis had any degree or semblance of validity to it at all?

Mr. Tolin: One other comment——

The Court: Well, this argument has to end some time and it might as well end now.

The court will take the motion under advisement and rule on it at 10:00 o'clock in the morning.

In the meantime we will go over your requests in chambers.

Mr. Christensen: Very well, your Honor. May we have a five-minute recess?

The Court: Yes, the court is recessed until 10:00 o'clock tomorrow morning.

(Whereupon, at 3:45 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., Thursday, July 14, 1949.) [179]

July 14, 1949; 10:00 o'clock a.m.

(The following proceedings were had in chambers without the presence and hearing of the jury:)

The Court: The record may show at this time that the defendant's motions made at the close of the government's case are denied.

You can state your exceptions to the failure of the court to give certain requested instructions; and if you have any exceptions, Mr. Tolin, you may do likewise.

Mr. Tolin: I have no exceptions.

Mr. Christensen: In the light of the court's announced general instructions, we have no exceptions to take as to the first 18 instructions offered, the instructions being the ones filed in advance of the trial.

As to those that the court in the group of 18 that he is not going to give, and there are five of those that the court has announced that he is going to give, since the court is giving our requested instructions 17 and 19 and 21 and 22 and 23, and instruction 24 and instruction 25——

Mr. Tolin: I am not sure about 24. May I see that one?

Mr. Christensen: It was amended.

The Court: Yes.

Mr. Christensen: And instructions 25 and 26

and 32, some of which instructions were amended with the consent of [181] the defendant, we have therefore no exceptions with the exception of an exception to the failure to give instructions 27, 28, 29 and 30.

Our exceptions with respect to those instructions is as follows:

As to instruction 27 we feel that the jury should be informed with respect to what, if any, obligations the defendant was under to answer questions propounded by local police officers in connection with the arrest or detention as a material witness in a matter involving the violation of a local gambling law, namely, that he was not required to state whether he was or was not a citizen. [182]

The same reason for the exception to Instruction No. 28.

The same as to 29.

The same as to 30, with the added reason that the jury should be informed that an individual's birth or citizenship—Strike that out—that a police officer, in connection with the arrest of an individual for an alleged violation of gambling laws, as to the place of an individual's birth or citizenship, that the arrestee is in such circumstances under no legal obligation to answer such question truthfully.

I think that is the series, Judge. Let me see if there are any in the supplemental instructions.

I understand, also, that the general instructions are being amended to include the one sentence in 1-S with reference to the point that the defendant is

not called upon to produce any evidence whatsoever as to his innocence.

I think your Honor wrote that in.

Mr. Tolin: Are you referring to the printed Judge James' instructions?

Mr. Christensen: Yes.

The Court: Yes. Following that insert No. 2.

Mr. Christensen: And I have withdrawn my supplemental instructions filed at the conclusion of the prosecution's case—I withdraw 2, 3, 4, 5, 6, and 7.

We except to the failure to give Supplemental Instruction 8-S. That under the state of the evidence here the mere [183] response by the defendant at the time of being either held as a witness or arrested for violation of gambling laws in connection with his being booked is not a claim, in the sense of the statute to be involved here, to being a citizen of the United States.

I think I announced I withdrew 7-S. I see that that is marked on mine "Refused."

The Court: It is covered in your main instructions.

Mr. Christensen: I was just going to say that I do not recall of any instruction which deals with the meaning and significance of the word or words "represent oneself as a citizen," and the language of the statute is "one who falsely represents himself to be a citizen," and that the yardstick or standard by which the word "represent" should be given to the jury, so that they may have an understand-

ing of the charge—that the word “represent” as set forth in the indictment, we say, should be defined to be that it means to hold oneself forth as a citizen, or to affirmatively claim to be a citizen, and that the naked answering of a question by an arresting officer in connection with a violation of local or municipal laws in and of itself does not constitute representing, as the term is used in the indictment.

The Court: I will give the first sentence of the second paragraph.

Mr. Tolin: The second paragraph, Judge, while——[184]

The Court: I say the first sentence.

Mr. Tolin: The second paragraph, he has commas——

The Court: I put a period there, and it covers it all. I will give that first phrase.

Mr. Tolin: I think he is entitled to that. Ending with “United States”?

The Court: Yes, “United States” period.

Mr. Christensen: I think that concludes it, then.

Mr. Tolin: I would like the record to show, in connection with Government’s Instruction No. 6, which we offered, that Mr. Christensen took exception to it at the time we formerly discussed it, and that he had submitted an alternate instruction on the same form, and that his instruction is to be given in lieu of ours at his request.

Mr. Christensen: That is satisfactory.

The Court: Let’s see what No. 6 is.

Mr. Tolin: No. 6 was the one in which we stated the elements of the offense.

The Court: That's right. All right.

Mr. Tolin: Our No. 6, then, will remain in the record as part of the record, so that if there is later——

The Court: Yes, we will give them all to the Clerk.

(The following proceedings were had in open court in the absence of the jury:)

The Court: Were there any other motions to be made in [185] the absence of the jury?

Mr. Christensen: I think not, your Honor.

The Court: You may bring in the jury.

(The following proceedings were had in the presence of the jury:)

The Court: Note the presence of the jury and the defendant. You may proceed.

Mr. Christensen: So stipulated, your Honor.

Mr. Tolin: So stipulated.

The Court: You may proceed with the argument.

Mr. Christensen: I believe, first, your Honor, I agreed to do this. I am prepared to stipulate, and I presume that will be as if it were a part of the plaintiff's case, that the defendant, Mr. Smiley, was born in some unknown town, approximately 40 years ago, in Russia, the map having been changed since, and I don't believe it is now a part of Russia, and as a baby he was brought to America, disembarking with his parents in the Dominion of Can-

ade, and that he remained in the Dominion of Canada, going to school there, until the age of approximately 15 years, at which time he entered the United States at the port of entry of Detroit, Michigan, and has since then been in the United States.

I don't know whether you are interested in the fact that he made a couple of visits home to Canada. I don't think that is material. And he has been a resident alien of the United [186] States during all the times mentioned in the indictment.

Mr. Tolin: Yes, except for short temporary absences.

Mr. Christensen: Except for the short temporary absences.

Mr. Tolin: I will accept the stipulation, it is along the lines which we have previously discussed with your Honor, and I will stipulate that it may be deemed to have been made prior to the time that the government rested, and prior to the time that the court ruled upon the several motions which were before the court, in order that Mr. Christensen need not renew the motions now.

Mr. Christensen: That is all right. It will be so stipulated.

I presume for the record now we should then let the record show that the defense rests, as it does not feel any need of offering any evidence in this case.

The Court: Very well.

Mr. Christensen: Should we now also have a stipulation that it will be considered that the dis-

cussions with reference to the instructions and the proceedings in that regard—that this resting of our defense has preceded that proceeding?

Mr. Tolin: Yes, I so stipulate. I think it was informally indicated, but it will get into the record. We so stipulate.

The Court: You may proceed. [187]

(Whereupon, Mr. Tolin made the opening argument to the jury on behalf of the plaintiff.)

(Whereupon, Mr. Christensen made an argument to the jury on behalf of the defendant.)

(Whereupon, at 12:20 o'clock p.m., a recess was taken until 1:30 o'clock p.m. of the same day, when the following proceedings were had:)

(Whereupon, Mr. Neeb made an argument to the jury on behalf of the defendant.)

(Whereupon, Mr. Tolin made the closing argument to the jury on behalf of the plaintiff.)

The Court: We will have our afternoon recess at this time. Keep in mind the court's admonition.

(A recess was taken.)

(Whereupon, the jury was instructed by the court and retired to deliberate.) [188]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the

above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 23rd day of August A.D., 1949.

/s/ SAMUEL GOLDSTEIN,

Official Reporter.

/s/ J. D. AMBROSE.

[Endorsed]: Filed Sept. 21, 1949.

[Title of District Court and Cause.]

Opening Argument on Behalf of the Plaintiff

Mr. Tolin: May it please the court and gentlemen of the defense and members of the jury. It now becomes my duty to do what they call summing up the case—summing it up for you.

The case is a simple one. It is before you on evidence on which there is no conflict. Witnesses A, B and C, and so on, all of the witnesses have given a mass of testimony to you which is harmonious, so you have no conflict to resolve.

While one witness testified to one point and another to another and in some instances two or three to the same, no witness is contradicted by any other witness or stipulation or bit of evidence, documentary or otherwise.

Perhaps there is no way in which to sum up a case which is more helpful than to go again into the papers of the case which are so clearly before the lawyers as they present the case, but which don't reach the jury very frequently.

I think you heard the charge summarized. Let me read to you one of these counts because if you believe beyond a reasonable doubt that the defendant did these things then he is guilty. If you don't believe beyond a reasonable doubt that he did then he is not guilty and it is of these things only with which we are concerned.

You are a fact-finding body—in a sense a committee of citizens brought here to hear the dispute, to decide what the facts are. The judge gives you the law and upon your conviction [188-c] the judge disposes of the case.

You have only one function to do and that is to determine the facts and then only three questions to answer. As to Count 1 guilty or not guilty, as to Count 2 guilty or not guilty and as to Count 3 guilty or not guilty.

Now, one of the charges—they are all drawn in the same language because each one is the same type of crime and each one is like the other except as to dates and places at which it was committed and the names of the persons to whom statements were made.

Count 1 charges: "On or about June 21, 1947, in the County of Los Angeles, State of California, and within the Central Division of the Southern District of California, defendant Aaron Smehoff, alias Allen Smiley, did knowingly, willfully, false and fraudulently represent to Thomas A. Cox, an employee of the police department of the city of Beverly Hills, California, said Thomas A. Cox be-

ing a person having good reason to inquire into the nationality status of the defendant, that he, the defendant, was a citizen of the United States, whereas in truth and in fact, as the defendant then and there well knew, the defendant had not been naturalized, had not been admitted to citizenship, and was not otherwise a citizen of the United States.”

Then there is a Count 3 in the same indictment which contains the same language about the charge but says that it [189] was on or about May 25, 1944, and the statement was made to J. E. Siu, a deputy sheriff of the County of Los Angeles.

Except for those dates and the name of Siu and the insertion of the “Sheriff’s Department” instead of the police department of Beverly Hills, the count is the same as Count 1.

Now you notice that I skipped from Count 1 to Count 3. For technical reasons Count 2 was re-drafted and it is before you in a separate indictment but it follows the same language with the exception that it states, instead of giving the name of any peace officer, it states, “The Los Angeles Police Department, a department and agency of the State of California.”

The reason that it does that is because that was one instance in which the representation was one in writing. And you might be interested to look at that which I pass to you and which is an exhibit in the case.

In the other instances people heard what was said but in that instance the defendant signed it and it

became and still is a record of the police department of the city of Los Angeles.

Now, I have told you the charge, but the charge is broken down into several different elements. It says that:

“On or about June 21, 1947, in the County of Los Angeles.”

We all know Beverly Hills is in Los Angeles County.

“State of California and within the Central Division of [190] the Southern District of California.

If we were in any other division we would be before a jury there instead of here.

“The defendant, Aaron Smehoff, alias Allen Smiley, knowingly, willfully, falsely and fraudulently represented to Thomas A. Cox that he, the defendant, was a citizen of the United States.”

Did he make such representation to Mr. Cox? The transcript bears out that he did. That is page 75, counsel.

After stating that the defendant was there under arrest at that police station in Beverly Hills Mr. Cox was questioned:

“I will ask you then, Mr. Cox, did you ask the defendant Smiley any question at that time?

“A. Yes.”

“Q. And did he give you certain answers?

“A. Yes, he did.”

And then Mr. Christensen stated, in order to shorten the matter as to the questions that were asked with reference to residence and birth and so

on, there would be no objection to it going into the record subject only to an objection that it is immaterial and irrelevant, and then after more colloquy along that line it was agreed that I should read the portions of the arrest report I held in my hand and it stated:

“Person arrested: Smiley, Allen. [191]

“Residence address: 1220 Sunset Plaza Drive, Los Angeles, California.

“Phone: Crestview 19145.”

Now, “person arrested,” we agreed a little later on in this transcript was placed there by the officer as his notation; that the residence address was given by Mr. Smiley and the date was placed there by the officer of his own volition.

Then Mr. Smiley was asked:

“Hair,” and the answer “gray.”

“Eyes,” answer “blue.”

“Height,” answer “5 feet 11.”

“Weight,” answer “170.”

“Age,” answer “39.”

“Complexion,” answer “ruddy.”

“Build,” answer “medium.”

“Descent,” answer “Jewish.”

“Nationality,” answer “American.”

“Where born,” answer “New York, N. Y.”

“Date born,” answer “1-10-8.”

“Time in county,” answer “20 years.”

“State,” answer “20 years.”

“U. S. A.,” answer “life.”

Now, is that a representation of citizenship? It would certainly be. Where can there be any other explanation for it? [192]

When he was asked the question of his descent he referred to his racial background. When he was asked the question of nationality, and "nationality" is an enlargement of the word "nation." When we speak of Canadians we say "Canadians" and when we speak of citizens of Mexico we say "Mexicans." "American" is peculiarly a word referring to citizenship in this country, particularly when it is coupled with the word "nationality."

But if there could be any room for argument there, and I don't think Mr. Smiley was a subtle sort of person to be thinking in fine terms of evasion. He was thinking in plain terms of deceit. If there could, however, be any question—if you might think that he was one of these people who harp upon fine distinctions of words then he was asked where he was born and he said, "New York, N.Y."

People born in this country are citizens ordinarily. It has been stipulated that this man was an alien and that people born in New York are citizens of the United States—born in this country.

Mr. Christensen: Now, that is stating a proposition of law and I dissent from that proposition of law because there are exceptions——

The Court: That is true.

Mr. Christensen: Indians for years were not citizens.

Mr. Tolin: I will concede that for years Indians were [193] not although I think they are now. I will also concede further, Mr. Christensen, to round it out, that persons who are the children of diplomats of foreign countries born here at the consulate and the like of course would not be citizens of this country. They would be citizens following the nationality of their parents who are here in the diplomatic service.

Mr. Christensen: And having been born abroad and repatriated, but that is something we shouldn't argue here. Counsel's statement wasn't exact is why I had to interpose, and I am sorry. I hope I don't have to do it again.

[Mr. Tolin:]

Well, members of the jury, it does seem that in the face of the stipulation that Mr. Smiley is not a citizen, and there is no reason here to talk about the children of members of the diplomatic service of other countries or American Indians, that he was born in New York, is a man standing under a most serious situation.

If someone had been murdered and this man was in custody and there in the police station and he answered a series of identification questions——

Mr. Christensen: Now, if the court please, that is going way beyond the record again. The only thing that appears in the record is what he said in his opening statement, which the record shows, and that was on a specific occasion they interrogated certain individuals out there and he was held as a witness and was released the next morning. There

isn't any [194] evidence as to what actually transpired.

The Court: I think the record shows he was merely held for investigation. That is my recollection of it.

Mr. Tolin: Yes.

Mr. Christensen: And there is no evidence of anybody being murdered. Starting to talk about these collaterals I don't think is helpful at all to the basic issues and is prejudicial.

Mr. Tolin: Let us say that Mr. Smiley was before the booking officer of the Beverly Hills police station under most serious circumstances. He was held on suspicion of something and he was asked these identification questions: "Nationality—American. Where born?" And the answer was: "New York." It was this nation, America, to which he was referring.

When asked where he was born he said "New York."

When he was asked when he was born he said, "1908," and when asked how long he had been here he answered "For life."

Well, if he had been here from 1908, at the time he was born in New York, down to the time at which he told the officer that, or made that statement and said he was an American citizen, you are not going to think when you look at the report that the officer wrote down, when he transcribed his answers onto paper, that he was telling them that he was a Canadian citizen or a citizen of Russia. You are going

to [195] take it that he means he was a citizen of this country.

So we have the representation with only the one meaning that can be placed upon it. Having that in mind, let us look at the other elements involved.

It would appear from the indictment that the statement was made knowingly. Of course if Mr. Smiley thought that he was a citizen of the United States, that he was an American citizen and he wasn't, we would not be in very good grace here asking that he be indicted because this is a crime which carries with it the consciousness of doing the thing that is denounced. If he thought he was a citizen we would not be here, but did he think he was? Take a look at Exhibit 1. Exhibit 1 is for the most part an undated document but there is an insert in it on a different type of paper which is dated January 20, 1948. It doesn't seem to have much to do with this but it was left here. It has his signature on it and this was an application for registry under the Nationality Act of 1940 filed with the Immigration Service and in it he says, "My nationality is Canadian or Russian." [196]

He doesn't say Canada or Russia or United States. He doesn't equivocate at all as to United States being there. He isn't sure whether it is Canadian or Russian, and that is an understandable thing, that a person who moved from one country to another as a little boy might not know of which country he was a citizen. But he knew he was a citizen of one or the other, and he said so.

Then there is a document in the record which is dated beyond all question. It was a sworn statement. Allen Smiley. It says: "Affidavit for persons 14 years of age and older. I have read the above statements, and do hereby swear that these statements are true and complete to the best of my knowledge and belief. Allen Smiley." His signature. "Subscribed and sworn to before me at the place and on the date here designated by the official stamp below. Perley B. Dunn, Special Inspector," and the stamp immediately below it says, "October 1, 1945."

What does that document say? It is one signed by him, sworn to by him, and in it he says that his name is Aaron Smehoff, that he entered this country under the name of Allen Smiley, that he has also been known under the name of Abraham Smickoff, that he lives in Hollywood, that he was born on January 10, 1907, and as of that time he had no uncertainty where he was born, because he says, "I was born in (or near) Belitza, Russia. I am a citizen or subject of [197] Canada."

Now, a man who goes about, apparently—I don't know what the connection of this document is, and Mr. Christensen says it is well to stay out of collaterals, but it looks like something that is part of naturalization proceedings.

Mr. Christensen: I didn't hear that.

(The record was read by the reporter.)

Mr. Tolin: Referring to Exhibit 1. I don't know

what it is. We will leave it at that. The jury can tell from looking at the document itself.

A juror says would it be possible to read it later; that if he reads it now it will take his mind off what is being said. So I won't pass it.

I do not contend this man ever made an application for naturalization, Mr. Christensen. I don't know what the significance of this Immigration and Naturalization proceeding is, of this oath. It isn't an oath. It is a signed statement that was filed under the Nationality Act of 1940.

The other one is quite clear as to what it is, Exhibit 2. That is the Alien Registration form that was required to be made at the outset of the late war by persons who were in this country at that time and who were not citizens of this country. That appears from the instrument. That was a required document.

In these documents he says, in one instance, he was a [198] citizen of Canada or Russia, he knows not which, and in the other one he is a citizen of Canada. And in one that he was born in or near Belitza, Russia, and in the other that he was born in a village in Russia, the name unknown. Doesn't that supply pretty clearly the element that he knowingly was false when he told Officer Cox that he was born in New York and lived in this country all his life, and that his nationality was American?

Then there comes this element: “* * * said Thomas A. Cox being a person having good reason to inquire into the nationality status of the defendant, * * *”

Well, did he?

The record doesn't seem to leave any doubt. There is no contradiction of Mr. Hood's testimony. There is no contradiction of Mr. Cox's testimony.

As to the other counts, there is no contradiction of Officer Siu of the Sheriff's department, or of Officer Harper of the City Police Department of this city, or of Lieutenant Cunningham of the Police Department, or Deputy Sheriff Becker.

What do these people have to say that would show whether or not there was any relevance, whether or not it was a serious type of situation, or whether it was an idle boast or jest?—for we wouldn't prosecute him for an idle boast or jest made under conditions of levity in a joke. Federal courts are places where you get prosecuted for serious [199] statements. There are few times that are more serious to men at the moment when they are experiencing them than the time when a police officer has you in the booking room of the jail, charged with something. Ordinarily you are going to have to post bond to get out. Sometimes you can't get out even that way. You are in jeopardy; you are going to be brought before the judge, perhaps the jury; you are in danger of losing, perhaps, for a longer time your liberty. At the moment you have lost it, you are there, the jailer has you, you are being asked questions, it is a serious proposition. But it is the beginning, not the end of the case. People are booked at the jail, and then the wheels start to turn. The prosecuting officers review the evi-

dence and determine whether they are going to file a complaint or information, or present it to the grand jury. Informations or complaints are filed; the man is arraigned, bail is fixed, he goes out on bail in most cases if he is a man of any substance, and this man was able to succeed to the expensive apartment that Lana Turner used to live in, Mr. Christensen brought out, so he would ordinarily be able to make bail. Out they go on bail. Then they come in and have to enter a plea of guilty or not guilty. If they say "Guilty," then there is the time that elapses while probation officers make their report. The man comes back for sentence, and that is what they used to call in the Scotch law books the terrible day of judgment, or the dread day [200] of judgment. And it is because, even if it is a small offense, no one likes to go to jail.

And if he pleads "Not guilty," then there is the trial and he has to go through that and wait while the jury makes its deliberations. And if they convict him, he has to enter, then, into the possibility that the court is going to either take away for some time his liberty or place him under the restraining, limiting life of one on probation. He has to behave under particular rules, or have taken away some of his money by fine.

So it is the beginning of a serious process.

What of a prudent police officer who is going to book a man and get the identification material for that man?

Everyone has heard of men jumping bail. What happens when they jump bail? Well, the bail is forfeited, a bench warrant is issued, and out goes the Sheriff or officer to look for him. So they want to know does this fellow have blue eyes, about how heavy is he, all of those things. And Mr. Hood of the F.B.I. said it is most helpful to have this information concerning the nationality of the man, because when you go out to look for him you don't run around in the streets asking people to give you their fingerprints and stand by while you compare them. You go into neighborhoods where people belong to societies or groups, or where they have their friends, and you start making inquiries, and these things about a man's [201] antecedents, and the like, are important. So the Police Department had good occasion to inquire for its own use. And beyond that good occasion to inquire, there is a Federal Bureau of Investigation with its central office in Washington, and that office gets a fingerprint record and gets a report of what the answers were to these questions, and it goes into a central file, because that office is sometimes called upon to search for fugitives. That office is called upon to investigate many people for many things. And when a person is arrested, it is up to that office to accumulate as great a file of identification material as it can.

So this information is relayed on there, and then, if the subject arrested is an alien, it might be—I don't say in this case that it was, that Mr. Smiley

had an application for citizenship, for we have no evidence that he ever applied, and I will not contend that he did—but it might be that he would have a petition pending for naturalization. How serious it is to a man who is going down there taking these examinations as to citizenship and bringing in witnesses to prove good moral character, how serious would it be for the immigration officer on that case to get a call from the Beverly Hills Police Department saying, “We have a man here who says he is a citizen of such and such a country; he is arrested.”

Of course it wouldn't mean that he would be denied citizenship, necessarily, but it would alert the Immigration [202] and Naturalization Service to look into that fellow a little bit.

When people are before the Immigration Service on any of the other matters, that Service has the duty of determining the right of the alien to remain in the United States. It is the office which arranges deportation matters.

Suppose that that office were considering the subject of Mr. Smiley, or Mr. Smehoff's deportation, that he was a subject of inquiry here. He might be getting along famously, from his standpoint, in warding off whatever attacks are made, in answering whatever inquiries are made. How embarrassing it would be if, when he went down there one day, the Immigration Inspector would say, “Well, Smiley, the Deputy Sheriff has called off, the Los Angeles City Police officer called up,” or, “The

Police Department of Beverly Hills has called up and said you are in trouble there, you have been arrested," and that is what Lieutenant Cunningham said they would do if a man answered he was an alien.

But this man got the advantage of not having that done, therefore I think we have demonstrated the element that said Thomas A. Cox was a person having good reason to inquire into the nationality status of the defendant, so he could do his duty and make out the report and get it to the people who might be lawfully interested in it.

The other counts follow the same. [203]

You have the solemn duty of acting as jurors, but you also have the pleasure in store for you of listening to two celebrated defense attorneys here, Mr. Christensen, an oldtimer of the bar, once associated with Clarence Darrow for years, and Mr. Neeb, presently associated with Mr. Giesler. They are tops in presentation. I do hope they will argue to you the elements of the case. Oratory can become spellbinding, but this is a serious matter, not only of entertainment and being moved by emotionalism, but looking at evidence.

Just a word on these other counts, then I will relinquish the floor to these distinguished gentlemen. You will, I am sure, enjoy their matchless delivery, but I hope you will scrutinize what they say and bear in mind as they talk what these elements of the offense are.

The indictment says he did this. He says by his plea of "Not guilty" that he didn't do it. It is up to you to find out whether he did. It is that thing in the indictment that he is charged with, and not what somebody else might be charged with or some other thing that he might have done, or some result that might prove you can convict him. The charge is he, knowing he was not a citizen, said he was to someone who had a good reason to inquire.

We have then the Los Angeles Police Department count, where I have handed you this morning the defendant's written [204] statement.

We have the Beverly Hills Police Department count, in which I have read you what Mr. Christensen stipulated was asked by the officer.

There remains the count concerning Mr. Siu. Mr. Siu, an officer of the Los Angeles Sheriff's Department, made an arrest of the defendant, and what the defendant said to Mr. Siu, Mr. Siu wrote it down on his record: "Years lived in county—18 years. State—18 years. U.S.—Life."

Then Mr. Siu turned him over to his associate, the record deputy, who finished filling in the form, stood there at a typewriter and asked the questions and wrote the answers as given by the defendant. It was all part of that one transaction, and it says: "Race"—I can't read that, it is too obscure here, but you with good eyes on the jury, some of you probably read it. But the birthplace is very clear. "New York City, N.Y." "U.S. citizen" is very clear. It says "Yes."

There isn't any question about the facts. The defendant made those statements. The defendant was in jeopardy. If the Immigration Service knew about those statements there might be trouble. He didn't want them to know that he was in trouble. True, he had told them he was an alien. The law said he had to. Being an alien here, he had to go down to register under the law that was prevailing at that time. He [205] told them he was an alien; not that he was doing whatever it was that led him thrice to law-enforcement officers, who were people who would tell Immigration if they knew that Smiley was an alien.

Thank you.

The Court: We might have a five-minute recess at this time.

Mr. Christensen: Thank you, your Honor.

The Court: Keep in mind the court's admonition.

(A recess was taken.)

(Whereupon, an argument was made to the jury on behalf of the defendant, which argument was reported by the court reporter but not transcribed.)

Closing Argument On Behalf Of The Plaintiff

Mr. Tolin: If the Court please, Mr. Christensen, Mr. Neeb, and members of the jury. Mr. Christensen and Mr. Neeb have performed largely as I told you I thought they would, seeing that I have been hearing them for years. Over the last eight years Mr. Christensen is always shocked by the proposi-

tion, Mr. Neeb is always ashamed of the prosecution, and the decadent nations that have fallen aside are always brought up. But the indictment is not very frequently mentioned.

We have talked about a lot of things here, so many things, at considerable length, and so loudly, I suppose on the theory that what is spurious gains some integrity if you shout it. [206]

I wonder if, perhaps, Mr. Christensen and Mr. Neeb haven't been reading Dr. Conant's, of Harvard, book about the law of probabilities, written in the field of mathematics. I have some intellectual friends who have, although I can't go into some fields like they have. In that book there is a little jingle:

There was once a learned baboon
Who insisted upon playing a bassoon,
He said, "It is perfectly clear
If I play this a year
I will sometime hit on a tune."

And so counsel have played their bassoon hoping to hit something which would have some appeal, but it is all rather discordant with what the issues of the case are.

It is the issues of the case with which we are concerned.

Of course, if you think the defendant isn't guilty, you should let him go. We don't want innocent people convicted.

If we have made a mistake and presented the

wrong matter to the Grand Jury, by all means call us down on it and bring in a proper verdict.

But, also, if this man is guilty, do that duty too, say that he is.

Mr. Neeb has referred to his four S's. He always does that. It sounds about the same, whether he is trying one type of case or another, and it is a stock line, so it comes out. [207] But what possible place has it in this case? Where is there any speculation? Mr. Christensen stood up here and said that he stipulated the defendant was an alien, so you are not asked to speculate about that, or to suspect about it, or surmise about it, or to suppose about it. It just isn't in issue.

As to the statements that were made to these officers, no one has contradicted those officers. In fact, when we got going on the trial and got down to the third officer to whom these statements were made, counsel stipulated to that. So we have no speculation, surmise, suspicion or supposition as to what was said.

As to whether Mr. Smiley might have thought he was a Canadian citizen, that was brought to you by the device of saying: Well, perhaps one of you people might have a daughter who would go up to Canada and marry someone and get confused about citizenship when being questioned by a policeman.

Mr. Smiley in the exhibits before you has stated under oath that he was a citizen of Russia or Canada. He had no confusion. There isn't any

evidence here that he had any confusion. And the fact that some police officer in his individualistic style up in Fresno got out—what was it?—some of those antiquated things that Mr. Christensen talked about, some instrument of torture, what does that have to do with this case? No one contends here that Mr. Smiley was [208] under any torture, or that he was coerced, or that he was intimidated. There isn't a suggestion anywhere in this record that he hesitated to answer the questions. If he didn't want to answer the questions, he could have stood on his right to refuse, if he had that right. But he answered. He never came to the place where he would find out what would happen to a man who didn't answer. He never got that far. He answered. And he went out of his way. Knowing that he had not been born in New York, he said he had been. Knowing that he had not been in this country all his life, he said he had been. Knowing that he was an alien, he said he was a citizen.

It seems to me it would have been much simpler to have told the truth. Why wouldn't a man?

Counsel, of course, say to you that he had been shooting dice. They refer to one instance in which Mr. Christensen jumped up and made some suggestion that maybe I would stipulate about something or other in connection with that offense. But what ever comes into the background of these offenses otherwise, whenever it comes beyond those dice and that one offense, you start hearing about collateral issues, "Let's not go into them." He

started saying, "Let's not go into collateral issues." That is all right with me not to go into them, because we are not trying him here for anything except the three offenses that are set forth in this indictment.

I went over that with you this morning and matched the evidence up to those offenses. [209]

I thought I did it so that even Mr. Christensen, who has the great capacity for misunderstanding, would get it and I suppose he did understand but, as he says, he has a duty to bring forth everything he can on behalf of his client, so he got up here and because he didn't understand me, and it might have been my fault because I kept my voice down, kind of talking to you, or because of his duty to try and get this defendant off, he and his colleague have come up here and distorted entirely the explanation I gave to you which is a clear one and one that you probably have arrived at yourself as to why this was a—why these officers when they asked the questions were people who had a reason to inquire.

He says that when Smiley was arrested on these occasions he didn't have to answer; that a man has a constitutional right not to incriminate himself; that when you people, he suggests, might someday be in a police station that the best thing you can do is not talk about whatever it is charged with.

Well, Mr. Christensen misconceives entirely the booking transaction which are the gist of this case, of these three crimes.

Seven peace officers have testified here. Has it occurred to you that only one of those officers was an arresting officer? That was Officer Siu. He went out and made [210] the arrest, and the count that we call the "Deputy Sheriff Siu Count" rests upon the testimony of Deputy Sheriff Siu and someone else.

Who was the other man? Was he an arresting officer? No, he wasn't. Neither he nor any of the other six were. They were not the officers who were investigating the crime at all.

Certainly it makes no difference, I will agree with Messrs. Neeb and Christensen on one thing, it makes no difference whether a gambler be an alien or a citizen. It makes no difference whatsoever whether a robber be an alien or a citizen. They have offended against the laws that prohibit certain things.

But the investigation of the offense when a prisoner is brought in is the one that falls to the arresting officer or to the investigating officer. It doesn't fall to the clerk at the desk. The clerk at the desk has a separate and distinct duty.

Officer Ecker said that he was assigned to the records and communications division. He had no part in the arrest. He first saw the defendant when he came in to be booked.

Milton H. Hopkins said that he was the senior clerk in the Los Angeles County sheriff's department and that as such he booked prisoners.

Morton L. McIntyre said, "I am the identification officer [211] at the Beverly Hills police de-

partment. I had nothing to do with this arrest.”

Officer Cunningham said that he was with the record and identification division and the arresting officer in that case was not even brought in here. We don't know what was said to them. Perhaps it would have made no difference because they were investigating whatever that undisclosed crime was for which they had booked this man, or for which they had brought him in, rather, to the identification bureau to be booked.

Officer Harper said when I asked him: “Were you the arresting officer,” he said he did not make the arrest.

I said, “Well, what was your part in the transaction,” and he said, “I was the booking officer.”

Cox—I started to say “Officer Cox,” but he isn't even an officer. I said: “What was your occupation there with the police department,” and he said, “Desk clerk. I was one of the fellows who kept all of the identification records together and booked the prisoners.”

The desk clerk, the senior clerk, the record and communications division men, were not men who were pursuing the inquiry about that murder or about the crime that hasn't been described here or about the shooting of dice which has been.

They were accumulating records.

Now, Mr. Hood has been somewhat run down as a witness by [212] Mr. Neeb, who said that Hood is a person, a very fine man, but that he had no part here.

We thought that Mr. Hood, being the head of the Federal Bureau of Identification in this district, and having been with the bureau for a long time was, perhaps, the better qualified man to tell you how these records are used. And this is what he told you. I won't read it all because it covers many pages, but he said at page 102, counsel:

"From the information obtained on criminal fingerprint cards submitted to the bureau by various law-enforcement agencies we may from time to time prepare identification orders; we may on direct inquiry from a law-enforcement agency furnish them complete or summary bits of information from those identification cards if they ask for it. We use it ourselves for seeking the apprehension of fugitives and others whom we have process out for or wish to locate."

I then asked him:

"Is the information regarding the nationality or citizenship of a subject who is reported on one of those cards used by your bureau in the way in which you have described?"

Mr. Hood said: "It might well be in some instances. It is a pertinent part of the identification record, the same as a man's age or his height or his weight. Frequently it would be of tremendous value to an investigating officer if he had that information. That is why it is on there." [213]

Then I asked him: "Is there any central place in the United States that you know of where identification material concerning persons suspected of

crime, arrestees, and persons prosecuted, is kept?" And the witness said, "The bureau maintains those records in Washington, D. C., in its identification division."

Then I asked him: "Does the Federal Bureau of Investigation ever determine, on its own motion or pursuant to law or regulation, to refer information concerning an arrestee to the Federal Bureau of Investigation? I mean to the Immigration and Naturalization Service."

You will remember that the Service was interested in Smiley and Mr. Hood came back with the answer: "At any time in connection with our cases, when an alien receives a sentence in court, the Immigration Service is automatically advised of that fact."

Then I asked him: "In determining whether to make a referral to the Immigration and Naturalization Service, do you use the identification material respecting which you have testified," and he said, "Frequently it is necessary, in view of similarity of names and other reasons, to give the complete summary on the identification card, on the fingerprint card."

Well, the bureau has considerable use for that and you will note that they make referrals to the Immigration Service. [214]

There was a point made here that I told you this morning, that booking is but the start of a person who is arrested. When he is arrested he is taken in and booked. That is the beginning. And

I said then he makes bail and there is an arraignment. Then he comes back for trial and he is at liberty for a considerable period of time on bond, and if he should abscond then of course all identification information is something of vital interest to those who must look for him.

Now, counsel comes back this afternoon and distorts that. He said to you that it wouldn't make any difference to a judge in determining what bail a man was going to be put under, whether he was an alien or not, and I think that is probably right. But counsel has completely distorted what I told you this morning. I don't contend to you that it makes any difference whether a man is an alien or a citizen as to how much bail he is going to be put under, under ordinary circumstances, but it is important when a person does post bail and does go forth and leaves, the identification material that they have be accurate material so that they will know and all that they need to know or can determine in order to assist in the reaprehension of the party.

Now, Officer Cunningham testified about the use to which this information is put. He said that he was an executive of the record and identification bureau and he was asked this question: "Does that department, when a person who is arrested gives information that he is not a citizen of the United States, does your bureau refer that information on to any agency of the United States Government," and he answered, "Yes, we do. If it is

brought to our attention in the arrest report that the man is an alien or illegal entry, if some information comes to our attention that way we call up the Department of Immigration. I believe Mr. Pendergast and Mr. Cole or Mr. Nelson are the men we generally contact."

"Q. And you give them that information?

"A. Yes, we do."

Then Mr. Christensen went into that inquiry and he said: "In the instance of Mr. Smiley here, did you advise the Naturalization and Immigration Service, Mr. Pendergast or anyone else," and the officer said, "No, I didn't."

Well, why didn't he? It would have been of the greatest interest to that department, not in order to determine whether Smiley was an alien, because they had already knew that—they had had him on the fire down there before. They had these exhibits before them. He was under a deportation proceeding. Perhaps he was trying to set up his good moral character—his obedience to law and so forth—in order to escape deportation.

In any event the Immigration Service had a case. They didn't have to look to the police to find that out. But they would be interested in knowing that he was in trouble with [216] the police.

Officer Cunningham didn't tell them and the fact that he didn't tell them meant they didn't find out and when they didn't find out Smiley here got the advantage of not having to go down to the Immigration office for further investigation on that. He

got the advantage of not having immigration inspectors out inquiring what was back of this charge and this trouble he was having with the police department.

That is the fraud which counsel says will I point out. I don't know why he asks that I point it out again. I pointed it out again this morning but I mention it again because of the distortion of the argument which has been made.

Counsel has also emphasized that "falsely" means perfidiously, whatever that is, treacherously and so on. But he worked that comment in with a lot of general data to the effect that the escalators in the Federal Building are on the wrong side and that while robbers must be truthful, gamblers may lie and other matters which seem to have nothing to do with our case.

Like Mr. Neeb and Mr. Christensen, they are satisfied with the instructions of the court. You listen to them and please follow them. You will find in there that the court will comment that the word spoken must not be spoken in jest or to stop the prying of some busybody and that they must be made to a person having good reason to inquire. Who had a [217] better reason to inquire than the police department that had the duty of passing on to the Immigration Service the information as to whether or not they had an alien there who was in trouble.

After all, these police departments get their fingerprint supplies and forms from the Federal Bu-

reau of Investigation. All that is correlated together. They get information themselves from there. They are under a duty to provide this information.

Officer Cunningham came in and told you so. I asked him to bring the book of regulations——

Mr. Christensen: Now, if the court please, I am going to object to this. There is no evidence that there is any legal duty whatsoever. It is purely a matter of comity and that is as far as the evidence goes.

Counsel has ranged pretty far and I haven't wanted to interrupt on some other things that he said——

The Court: I wasn't paying any attention to him, I am sorry.

Mr. Christensen: Perhaps I shouldn't either, your Honor.

Mr. Tolin: I stand on the record. I will let the jury decide what the record shows. [218]

The time is getting on, and while I have considerable time I really have heard very little that requires an answer, so I am not going to take the rest of my time to argue to you further.

The government asks you to do your duty. If you think this evidence shows that Mr. Smiley lied to the officers, as the officers said he did, and which is not contradicted, and if you believe he knew he was a citizen of some other country, which he said he was, and no one has contradicted that statement that he made to the immigration officials in

writing, and if you believe that he intended them to think he was a citizen and thereby escape the further investigation he would have with Immigration if they knew he was an alien, then he has perfidiously, falsely brought himself into the position where the only answer to your duty is to convict him.

This matter of citizenship is a very serious one, which those of us who are born with sometimes don't appreciate as much as those of us who had to acquire it by going through the very deliberate and careful naturalization process that is made available to all aliens of good moral character. But when one becomes a citizen he does acquire certain rights which he didn't have before. As my chief, Mr. Carter, who is sitting here, always likes to say when he is talking on the value of citizenship—and a lot of organizations have him out to talk to them—when we become citizens we acquire a [219] share of stock in the largest beneficial corporation in the world, the United States. And until we have satisfied the United States, through its constituted officers, if we come from someplace else, that we are entitled to receive that share, we don't have it. The law says you can't go around saying you do. Smiley says he did. He said it under most serious circumstances, and I submit he should be convicted on all counts.

Thank you.

The Court: We will have our afternoon recess at this time. Keep in mind the court's admonition.

(A recess was taken.)

(Whereupon the jury was instructed by the court, which instructions have heretofore been transcribed and are contained in a separate volume.)

(Whereupon the jury retired to deliberate and the following proceedings were had in the absence of the jury:)

Mr. Tolin: The jury having left the courtroom, I note that there are some exhibits for identification which have not been segregated from the exhibits as a whole. I think they ought to be set aside so there will be no chance of the jury getting them.

The Clerk: That has been done, Mr. Tolin. If you wish to check them, I believe it would be better.

Mr. Tolin: I think Mr. Christensen or Mr. Neeb, for the [220] defendant, should check them.

Mr. Neeb: I have my record of them.

Mr. Tolin: Mr. Neeb, I will hand you the envelope which the Clerk has handed me.

The Court: After they are checked, you gentlemen will stipulate that the exhibits in evidence may be handed to the jury.

Mr. Tolin: That stipulation, we will make it now.

Mr. Christensen: Yes, sure.

Mr. Tolin: Those that are handed back to the Clerk after checking may go to the jury.

Mr. Christensen: Yes.

I want to express to both court and counsel the delight that I have had in the course of this trial,

and the very excellent manner in which both the court and opposition have treated me and my colleague.

Mr. Neeb: I join in that, your Honor.

The Court: It has been a great please to the court, gentlemen, I assure you. And I meant no disrespect to Mr. Tolin when I stated that I did not hear all of his remarks. I did not hear all of yours either, Mr. Christensen.

(Whereupon a recess was taken until the return of the jury at 4:45 p.m., when the following proceedings were had:)

The Court: The Matron handed me Exhibit 1 that you wanted deciphered in some respect. What was that? [221]

Juror No. 7: That would be the stamp, your Honor, on the left-hand corner of that sheet.

The Court: This stamp (indicating)?

The Juror: Yes, the date of that stamp.

The Court: Well, I don't know. Can you gentlemen agree on the date that is on there?

Mr. Tolin: I think that is the one we couldn't make out earlier.

We are all of the opinion—that is, counsel are of the opinion that it is illegible.

The Court: That is the way the jury found it, evidently.

Mr. Christensen: Perhaps I should approach the bench and make this suggestion to other counsel.

The Court: All right.

(The following proceedings were had at the bench out of the hearing of the jury:)

Mr. Christensen: There might be the filing of this. When it was received it must be entered in some book, and that might give the date.

The Court: Well, I don't know anything about it.

Mr. Christensen: You haven't got that information?

Mr. Tolin: I don't have the information. I don't have it.

Mr. Christensen: In other words, when you file a document there must be some entry or registration.

Mr. Tolin: I might be able to have it traced down. I don't know how long that would be, or where we would have to go to do it.

Mr. Christensen: Neither do I. But isn't it the same as, virtually, Exhibit 2?

Mr. Tolin: It is very similar; it contains practically the same information.

The Court: Do they both bear the same date?

Mr. Tolin: No, they are separate instruments.

Mr. Christensen: One would be prior, wouldn't it? In other words, the certificate is really premised upon this registration application.

Mr. Tolin: I thought that was true, but there is a rider to this, I don't know if it is a rider or it is a part of the original instrument, which bears a later date.

Mr. Christensen: Well, that is an insert. That wouldn't be the determining date on that.

Mr. Tolin: I think it is in all likelihood, and it looks as if it were, the application upon which the alien registration was given, was made. That is, one is the application for alien registration, and the other one is the registration itself.

Mr. Christensen: I am willing to stipulate that it bears some date prior to Exhibit No. 2.

Mr. Tolin: I would say it was executed on or about that [223] time, at or about that date.

Mr. Christensen: Yes, and prior to. In other words, Exhibit 2 is the certificate.

Mr. Neeb: You make an application first, but how can you stipulate as to the time?

Mr. Christensen: That is true. We might agree upon this stipulation, that the court may say to the jury that it has been stipulated that Exhibit 1 is an application which preceded the certificate, Exhibit 2, dated October 1, 1945, but as to the exact time we do not know. And then, if you can find out——

Mr. Neeb: That is about as far as we can go.

The Court: All they ask is they want that date deciphered. That was their inquiry. It is illegible.

Mr. Tolin: We have no greater power of deciphering it than they have. We might give them a glass.

The Court: Could you do it with a glass?

Mr. Tolin: I don't think so.

(Whereupon the proceedings were resumed within the hearing of the jury as follows:)

The Court: Counsel are in the same quandary as the jury. They are unable to decipher the date of the stamp on the left-hand corner of Exhibit 1, so we can't help you in that respect.

Juror No. 7: If it pleases the Court, the jury would [224] like to have a printed copy of your instructions that you have given us prior to departing to the jury room, please.

Mr. Christensen: I have no objection, your Honor.

The Court: You have no objection to a transcript of the instructions being furnished?

Mr. Tolin: No.

The Court: That will be all now. When those instructions are prepared they will be delivered to you.

(Whereupon the jury retired from the courtroom.)

(Whereupon a transcript of the court's instructions to the jury was prepared by the court reporter and, after being examined by counsel, was delivered to the jury by the Bailiff.)

(Whereupon a recess was taken until 11:20 p.m., when the jury returned to the courtroom and the following proceedings were had:)

The Court: Have you agreed on a verdict?

Juror No. 7: Yes, your Honor, we have.

The Court: May I see it, please?

(The verdict was handed to the court.)

The Court: Do you want to listen to the reading of your verdict?

The Clerk: (Reading.)

“United States District Court, Southern District
of California, Central Division
No. 20069—Criminal

“UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALLEN SMILEY, Charged as AARON SME-
HOFF,

Defendant.

VERDICT

“We, the jury in the above-entitled cause, find
the defendant Allen Smiley, charged as Aaron Sme-
hoff, guilty as charged in Count 1 of the indict-
ment; and guilty as charged in Count 3 of the in-
dictment.

“Dated: July 14, 1949.

“M. N. KROOPEN,
“Foreman.”

“United States District Court, Southern District
of California, Central Division
No. 20604—Criminal

“UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALLEN SMILEY, Charged as AARON SME-
HOFF,

Defendant.

VERDICT

“We, the jury in the above-entitled cause, find the defendant Allen Smiley guilty as charged in the indictment.

“Dated: July 14, 1949.

“M. N. KROOPEN,

“Foreman.” [226]

Ladies and gentlemen of the jury, is this verdict as presented and read the verdict of each of you, so say you all?

Jurors: Yes.

The Clerk: Do you wish the jury polled?

Mr. Christensen: I certainly do.

The Court: Poll the jury.

The Clerk: Lyman Hougland, is this verdict as presented and read the verdict—is this your verdict as presented and read?

Juror Hougland: Yes, sir.

The Clerk: David Kay, are these your verdicts as presented and read?

Juror Kay: Yes, sir.

The Clerk: Carolina A. Resch, is this your verdict as presented and read?

Juror Resch: Yes, sir.

The Clerk: Clara A. Knight, is this your verdict as presented and read?

Juror Knight: Yes, it is.

The Clerk: Benjamin Kelman, is this your verdict as presented and read?

Juror Kelman: Yes.

The Clerk: Minnie Yodow, is this your verdict as presented and read?

Juror Yodow: Yes, sir. [227]

The Clerk: M. N. Kroopen, is this your verdict as presented and read?

Juror Kroopen: Yes, sir.

The Clerk: Loulella H. Rose, is this your verdict as presented and read?

Juror Rose: Yes.

The Clerk: Mable H. Folsom, is this your verdict as presented and read?

Juror Folsom: It is.

The Clerk: Theresa Drew, is this your verdict as presented and read?

Juror Drew: Yes, it is.

The Clerk: Margaret S. Pierce, is this your verdict as presented and read?

Juror Pierce: It is.

The Clerk: Wm. H. Klein, is this your verdict as presented and read?

Juror Klein: Yes, sir.

The Court: You may record the verdict.

Sentence will be imposed in this case on Monday, the 25th of July, at 10:00 o'clock.

The defendant is on bond. That bond may continue in effect until that day.

Mr. Christensen: Thank you, your Honor.

The Court: Now, when should this jury report?

The Clerk: When notified, your Honor.

The Court: You are excused until further notified.

Court will stand at recess.

Mr. Tolin: Is the Probation Department to render a pre-sentence report?

The Court: Yes, the matter will be referred to the Probation Department.

Mr. Christensen: Very well, your Honor. [229]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 23rd day of August, A.D. 1949.

/s/ SAMUEL GOLDSTEIN,
Official Reporter.

/s/ J. D. AMBROSE.

[Endorsed]: Filed Sept. 21, 1949.

Monday, August 1, 1949, 10:00 A.M.

(Other court matters.)

The Clerk: No. 20069 Criminal, U. S. A. v. Allen Smiley, charged as Aaron Smehoff. Hearing motion of defendant for new trial, and motion of defendant in arrest of judgment; sentence on counts 1 and 3; disposition of count 2. Count 4 heretofore dismissed.

Mr. Christensen: If your Honor please, since we have discussed at length the legal questions both on the motion for directed verdict, as well as in the consideration of the proposed instructions, I am not going to be prolix and lengthy in arguing a motion in arrest of judgment and a motion for a new trial. For the further reason that the facts are so simple in the case. In fact, we did not dispute them, stipulating that he was an alien, and, secondly, virtually admitting that on the occasions of his interviews by booking officers, as well as the Police Department in Beverly Hills, that he was asked certain questions with reference to his birth, and I think in two instances as to whether he was a citizen he responded "Yes," and those were undisputed. It was for that reason, your Honor, that I did not place the defendant on the stand, because, if he had been, he would testify precisely that way under oath, as he did precisely testify under oath that he was an alien when he was before the federal officials [3*] who had the right to inquire, and he then told them the truth. In these other instances, he was not, as we know, under oath.

I may have made a mistake because the jury didn't hear the sound of the voice of the defendant, but I could see no purpose because there was nothing to deny as far as the actual facts of the case were concerned. There were just those two simple facts.

I mention that because I am extremely puzzled at the result, particularly in light of the law as

* Page numbering appearing at top of page of original Reporter's Transcript.

given to the jury by your Honor.

Your Honor will recall the instruction—I have them here—to the effect that the matter must be material, or, rather, the answer to the question must be material to the matter then under consideration.

That is in keeping with, of course, the *De Pratu* case.

We know, of course, that alienage didn't affect the matter of suspicion of book making, or shooting dice. No distinction was made under the law that only aliens would be subject to that offense. Both aliens and citizens alike were subject to punishment or prosecution for that offense.

And it brings to thought the opinion that I cited to your Honor by Judge Hall, that while one may have a reason, or a good reason, in one's own mind, for asking certain questions, whether it be about citizenship, birth, marital status, political affiliation, that that is not what we are talking [4] about. The reason must be one that produces a given result. In other words, it is the result of the answer that counts.

Well, that, of course, is directly in keeping with the opinion in the *De Pratu* case.

I could review these instructions on end, but your Honor has them undoubtedly in mind. However, for fear that I may be challenged in not having perhaps done my full duty, I am only going to spend a minute or two in a sort of a brief refresher. For instance, the court instructed—I am reading from the stenographic report:

“Before you can convict the defendant you must further find beyond a reasonable doubt that the person inquiring concerning the nationality status of defendant was engaged in an inquiry concerning a matter which made the nationality status of the defendant relevant and material to the matter under consideration.”

In the application of that instruction the verdict is illogical. It is repugnant to that instruction.

Again, your Honor instructed:

“As applied to this case, ‘fraudulent purpose’ means that such representation was not only knowingly false and due to willfulness, but was made with intent to deceive such persons as to a material matter.” Who was that? A peace officer. But what was the [5] material matter?

Again there was no distinction made between whether one was an alien or one was a citizen.

Now, there are other instructions, but I am not going to proceed to read those. Your Honor undoubtedly has a recollection of those since I have pointed out two of the salient ones, and that should function, and undoubtedly will, as a reminder of the rest of the instructions.

I cannot help but again advert to the *De Pratu* case. There is something that was not before your Honor in the previous discussion. I have since then obtained the record and the briefs upon which the opinion was written. That is illuminating, as well

as, I think, a matter that will clarify some of the things that are contained in the opinion.

Now, the government argued in that case that:

“We are quite content with the interpretation in *United States v. Achtner*. The only requirement, as we understand it, is that the indictment disclose and the proof establish that the false claim of citizenship was not made in jest of empty boasting, but was made seriously to a person having a right to inquire.”

“A right to inquire” doesn’t mean just a casual right to inquire, but a right depending upon the result of the answer. In other words, all of these cases, every one of them, either [6] dealt with one applying for, let’s say, a saloon license—and the law required, as in this case, the *De Pratu* case, that he be a citizen—or that he be a citizen before he could vote. So one registers, one signs and answers questions in the form in connection with a poll tax which qualifies them, or it has been in connection with an application for citizenship. There they had the right, because the result, namely, the issuance of the license, or perhaps a conclusion as to whether or not one should become a citizen—or, even in the case of private employment, because of security purposes, an employer has an absolute right to know because you are obtaining something, there is a result. In this instance there could have been no adverse result, nothing gained by the police officer, anyone whatsoever, because it must be ma-

terial to that particular thing then under consideration.

So, as they argued in that case, it must be made seriously to a person having a right to inquire.

Proceeding further, they say at page 8:

“Counts 1 and 2, identical except for the date, allege that the claim of citizenship as made ‘in an application for a retail liquor license under the laws of the State of Montana, filed by him with the Montana Liquor Control Board.’ This is certainly a compliance with the rule that the statement was deliberately and seriously made in answer to a question propounded by one who had a right to ask it.”

Or like when you go before the Radio Commission you can't get a license as a radio operator unless you are a citizen, so they have the right. And if I should obtain one, and I happen to be an alien, there is a result which is contrary to law and I gain an advantage.

There is the thesis of the government in the De Pratu case, and that may, perhaps, enlighten us a little further with respect to the wording used in the opinion.

I have read this before. It is not long.

“Appellant also contends in effect that the charges and proofs do not sufficiently show that his claims of United States citizenship were material to the transactions at hand * * *.”

They must be material to the transactions at hand, and that is in keeping with the thesis in the government's brief.

“and were not mere boastful or jesting assertions. But the first two counts charge and the undisputed evidence establishes that the allegedly false claims of citizenship were made in appellant’s applications for a Montana liquor license filed with the Montana Liquor Control Board. At the time of such filing, no one but a citizen was eligible for a liquor license under Montana law.”

The court says then:

“In each instance, the inquiry as to citizenship was made by public officers in furtherance of their official authority and duty.”

That, of course, is an argument both that the verdict of the jury was contrary to the evidence and repugnant to your Honor’s instructions, and also supports, under the state of the evidence here, the motion in arrest of judgment.

The indictment itself was not the detailed one that you found in the *De Pratu* case, because there they affirmatively pleaded that he gave an answer in connection with an application for a liquor license, when the law required one to be a citizen. And that was showing that there was a purpose and a motive. But in this instance there could be neither purpose nor motive, because nothing could be accomplished.

And it is the matter at hand, the transaction had, as under the *De Pratu* case.

To meet the situation, counsel of course argued—and I must refer to that tenuous and specious argument, Mr. Tolin—he said, “Certainly he ad-

mitted under oath that he was a non-citizen and an alien to the immigration authorities," and that they knew about this.

In fact, we do know, your Honor, from the testimony of Mr. Hamilton, that the deportation warrant was served in about September, I think, of 1945, and also that the matter [9] had been under investigation from two to four years previous to that, so they were fully aware of his non-citizenship status.

But he says they did know that, and he doesn't contend that that affected it. But he does say, for instance, on page 203—this is the remoteness of the argument, it has nothing to do with the transaction at hand—that perhaps speculatively it might have had something of value in it and something gainful for the reason that the immigration authorities would then have known that he had been arrested for book making, and also for shooting dice.

I have taken the trouble, your Honor, to examine the press as of that time, and since he had the misfortune of newspaper notoriety, which perhaps is his greatest crime, he got publicity then, so he couldn't have accomplished anything with photographers, as one witness testified, and many newspaper men in the booking room. That was in connection with one of the arrests. I think that was the one in the Sheriff's office in 1944. And we certainly know what must have happened in June at the instance of his interrogation and being held in protective custody at Beverly Hills where he even

suffered, himself, a shot, and of course it isn't in evidence here, but, in other words, he was in the proximity of death, also, at the time. So, I have those, and I know that there was publicity at that time. [10]

But forgetting that phase of it, suppose there hadn't been any, the remoteness of it, your Honor, that it might have affected some future action. Well, there was nothing pending. In the De Pratu case there was.

It is pure guesswork.

Let me read the two contentions on page 203:

"How embarrassing it would be if, when he went down there one day, the Immigration inspector would say, 'Well, Smiley, the deputy sheriff has called up, the Los Angeles Police Department has called up,' or, 'the Police Department of Beverly Hills has called up and said you are in trouble there, you have been arrested,' and that is what Lieutenant Cunningham said they would do if a man answered he was an alien."

In other words, they would then get that information.

"But this man got the advantage of not having that done, * * *."

I think there is another phase of it along that line, but that is the basis of his contention that he did gain something by it.

I think at page 217 we have it again:

"Officer Cunningham didn't tell them, and the fact that he didn't tell them meant they didn't find

out, and when they didn't find out Smiley here got the advantage of not having to go down to the Immigration office for further investigation on that. He got the advantage of not having Immigration inspectors out inquiring what was back of this charge and this trouble he was having with the Police Department. 'That is the fraud * * *.'

That is the tenuous and I say specious argument. There is no proof of any advantage. It is purely a speculation that he might have got it because some action might have been taken.

Now, your Honor can take judicial notice—we don't have the record before your Honor as to what the proceedings were, but under the state of the records it was one of illegal entry. Now, that was the thing immediately under consideration. There is no evidence to show that the case was in a state of any order being entered so that he might then come in with an affirmative application. And to get a pre-examination and any privileges, your Honor, of re-examination so you may leave and re-enter, you must then make an affirmative request. That is in the law. That wasn't pending. Then at that time it will go for an examination and investigation by a separate department on the question of whether he qualifies, and moral character. But not until that point is reached in those proceedings. So we have an utter vacuum as to how it could be material, other than the speculation that they may have made some inquiry, and it might personally have [12] embarrassed him before that

department. That is the basis of the argument. Undoubtedly that is the theme that the jury must have followed in the light of your Honor's instructions.

But it must be material to the then transaction under consideration.

There is another thing we might say about this, your Honor. We look at the date of these matters. Way back in 1944, 1945, at least as to two of them, they were quite antiquated, and his proceedings were proceeding from then on before the immigration authorities. I think the original serving of the warrant was approximately contemporaneous with the serving of the warrant—no, it followed it by about five months, the serving of the warrant. One was in May of '44, the other was in November, and the warrant was served, I think, early September or October of 1944.

Of course, being realistic and looking around the corners, there may be something that lies behind.

I pointed out to your Honor that it was in these specific types of cases where a result was achieved, such as employment, a gain, liquor license, voting. There isn't a single case in all the books that even hints that any such situation as this, with the seriousness of penalties that are imposed, was in mind to be reached. It was utterly immaterial, your Honor, to the transaction at hand.

We do know that the Tanderi case has that in mind, and [13] that is the one from the Seventh Circuit, 152 Fed. (2d). There one was indicted for

claiming false citizenship in connection with an employment application. He was asked, "Are you a citizen"? and he answered, "Yes." Then there was testimony that it was the policy of the Bendix not to employ aliens. In other words, you had the two elements there, so you got a result. And having that in mind all the time and applying it here, well, of course, the evidence does not fit the decisions.

Then, of course, you have the famous *Achtner* case in which Learned Hand participated, in which he said:

"But we agree with the district court that the representation of citizenship must still be made to a person having some right to inquire or adequate reason for ascertaining defendant's citizenship
* * *."

Then they proceed to interpret the word "falsely" and they say that it must be "more than a mere untruth," and that it must be "perfidiously" or "treacherously" or "with intent to defraud."

None of those factors could possibly occur under the state of the evidence in this case.

I am not unmindful of the attitude of the courts in disposing of cases of this kind. The *Frederick* case, I called your Honor's attention to, and in that one the court made the observation, where the man went in and asked for the poll tax [14] form and signed it so he could qualify himself as a voter—that was a material matter—the appellate court affirmed, and that language your Honor recalls I read in the argument on the motion for a

directed verdict, and while they affirmed the case the court said as to the \$500.00 fine and 60-day sentence, that they affirmed without prejudice to filing a petition in the District Court for suspension of the 60-day sentence.

I know that the defendant here has been active in two types of business. I have had occasion to see a few of the letters that were filed with the Probation Department in connection with the pre-sentence report. I know he has been interested in certain activities in Texas in the oil business. I also know, if it were not for the pending of this litigation, that long before this he would have been domiciled in Texas, actively engaged in the oil business. His associate in the oil business, Mr. Josey, I think came into the city here, and I have ascertained something about the business, that they are in joint venture, and also that he is one of the, not minor but rather large, active oil operators in Texas.

Also, Mr. Walter Kirshner, who heads the multi-million-dollar Grayson and Robinson Stores, I know has been terrifically interested in him and has held open and available employment with him.

I know that there are many, many prominent people in various types of industry in this community and in the country, whom I also know, who have both a personal, social, and business relationship with the defendant.

I assume that many of those letters have been filed and are before your Honor.

Knowing those things, I am again more puzzled at the illogical verdict, and I have searched my brain again and again to find out how, in the face of the facts in this case, and your Honor's instructions, that we got this verdict. I could only explain it upon one theory, your Honor: the misfortune of the newspaper notoriety. And I think that commenced once when he had no part in the celebration of an orchestra leader here, and he went in there at the request of a woman and assisted in subduing the situation, and in consequence a lot of publicity inured.

I submit, your Honor, that on the law and the evidence in the case, and under your Honor's instructions, that the verdict is repugnant to those instructions, and not only that a motion for a new trial should be granted, but, rather, that a motion in arrest of judgment should be entered.

Mr. Tolin: If the Court please, this seems to have been a legal argument upon penalty and upon motion in arrest of judgment.

Mr. Christensen: That is what was intended.

Mr. Tolin: I was particularly interested about the splendid prospects this man has had in the oil business in Texas, and how, had it not been for the pendency of the case, he would have been right down there in Texas working in oil.

If your Honor will thumb the file, I think you will find time after time that he has come in here and asked if he couldn't leave this district because he had business interests in Las Vegas. So he got

that permission and he has gone repeatedly to Las Vegas.

Mr. Christensen: And Texas.

Mr. Tolin: Mr. Christensen says, "And Texas." But, in any event, his occupation shown by the probation report is "Gambler," and he has been principally in Las Vegas. He couldn't have been digging oil wells when he was looking out for his gambling interests there.

I don't want to take a lot of time, but Mr. Christensen is having such difficulty in determining the basis of the jury's verdict. Of course it was the jury's problem. But I should take it that the jury thought that there was a substantial right or reason to inquire.

Counsel is confused, or says he is confused, over the fact that this defendant was arrested for gambling offenses and was held in connection with the death of the individual in Beverly Hills. He says it makes no difference whether you are an alien or not, if you are a book-maker you are a [17] book-maker and you suffer the penalties of being a book-maker whether you are an alien or citizen. I think that is right. But there was no issue of whether this man was guilty of book-making or whether he was guilty of murder or whether he was guilty of gambling offenses, when he was questioned at the time he made these statements. We didn't produce a single one of the detectives who investigated those crimes respecting which this defendant was held. Those men had brought him to the jail, had turned

him over to the booking officer, and the booking officer had a separate function. He wasn't investigating the death of Mr. Siegel, nor was he investigating the book-making or the other gambling charge. He had a form to get filled out. It was for the identification records which became a part of the identification records of this subject in the master files of the F.B.I. in Washington and which are useful to the police department in determining its record of identification, and he asked the identification questions and he got the false answers, and it included this false claim to citizenship.

I know that our office doesn't bring prosecutions against people upon tips that we get out of reading the newspapers. Rather, I think the newspapers get their tips of prosecution by looking over the jail blotters. And I take it that the Immigration Service doesn't get its information as to which aliens that have deportation proceedings pending are in trouble with the police from the newspapers. They have a standing arrangement with the police to tell them whenever they catch an alien in some crime. That was what Officer Cunningham, the booking officer from the County Jail, and the Beverly Hills Police Department wanted the information for. For two purposes. Each of them had a legitimate reason to inquire, (1) so that their identification records would be complete on this man, (2) so if he were an alien they could carry out their commitment to the government to inform the Immigration Service that there was an alien in this particular trouble.

That certainly seems to fall within the language of the cases. It certainly is as serious as the case of Ledo, which we have argued in extenso here at the time of the argument for judgment of acquittal, where what Ledo did was to get himself in as president of his union on the basis that he was a citizen, and to get a pass to go across the yard of a private contractor that was doing Navy business.

I think the case has been made out, and inasmuch as a whole afternoon was spent arguing it, this morning I will submit it on these remarks, unless the court wants something more.

Mr. Christensen: Just so there is no misconception about the last case of applying for union membership. That was not this kind of a case at all. It had to do with a totally [19] different situation. It wasn't where one was indicted for claiming false citizenship under those circumstances.

Anent the oil business and Las Vegas, I think your Honor will find the fact that he was in Texas and engaged in the oil business was verified by the presentence investigation of the Probation Department. That is my recollection.

As to the question of employment. On that phase of it, I don't know whether Mr. Josey is here or not, he said he was on his way, so if there were any questions to ask either Mr. Josey or Mr. Kirshner, who is here, they are available.

I have nothing further to say to your Honor.

The Court: Very well. Stand up, Smiley.

Is there anything you would like to say before sentence is imposed on you?

The Defendant: No, your Honor.

The Court: It is the judgment of the court that you be committed to the custody of the Attorney General of the United States for a period of one year, and that you pay a fine of \$1,000.00. That is on counts 1 and 3 of Indictment 20069. The same sentence as to the one count in 20604. These sentences are to run concurrently.

Your motion for a new trial has raised a debatable question in the court's mind. I thought Mr. Tolin would share that view. So, in view of that fact, the court will admit the defendant to bail pending appeal, so that it will not be [20] necessary for you to make that application before the Circuit Court in San Francisco. Bail will be fixed in the sum of \$10,000.00.

That is all.

Mr. Christensen: May we have a stay for one day in order to arrange the bond, your Honor?

The Court: Yes, the court will release the defendant to your custody for one day.

The Clerk: How about count 2?

The Court: That was to be dismissed, wasn't it?

Mr. Tolin: Count 2 of the multiple-count indictment?

The Court: Yes.

Mr. Tolin: We dismiss it.

The Clerk: That is 20069?

Mr. Tolin: Yes.

The Clerk: How about 19778?

Mr. Christensen: That is the one with the \$5,000.00 bond.

Mr. Tolin: I will come down and dismiss it when the bond is posted.

Mr. Christensen: Under the appeal?

Mr. Tolin: Yes.

The Clerk: Will you post that today?

Mr. Christensen: Today or the first thing in the morning. [21]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 4th day of August A.D., 1949.

/s/ SAMUEL GOLDSTEIN,

Official Reporter.

/s/ J. D. AMBROSE.

[Endorsed]: Filed Sept. 21, 1949.

COURT'S INSTRUCTIONS TO THE JURY

The Court: It now becomes the court's duty, ladies and gentlemen, to instruct you as to the law that applies to this case.

Are you able to hear me?

A Juror: Yes, sir.

The Court: There are two indictments before you which have been consolidated for trial.

One of these indictments contains three counts. Count Two of that indictment has been re-drafted by the United States Attorney so that in considering the indictment which contains three counts, you will not consider the second count as it is written in that three-count indictment, but you will consider it as re-drafted in the indictment which contains but one count.

Count One of the indictment charges:

“On or about June 21, 1947, in the County of Los Angeles, State of California, and within the Central Division of the Southern District of California, defendant Aaron Smehoff, alias Allen Smiley, did knowingly, willfully, falsely and fraudulently represent to Thomas A. Cox, an employee of the Police Department of the City of Beverly Hills, California, said Thomas A. Cox being a person having good reason to inquire into the nationality status of the defendant, that he, the defendant, was a citizen of the United States, whereas in truth and in fact, as the defendant then and there well knew, the defendant had not been naturalized, had not been

admitted to citizenship, and was not otherwise a citizen of the United States.”

Count Three of the indictment charges:

“On or about May 25, 1944, in the County of Los Angeles, State of California, and within the Central Division of the Southern District of California, defendant Aaron Smehoff, alias Allen Smiley, did knowingly, willfully, falsely and fraudulently represent to J. E. Siu, a Deputy Sheriff of the County of Los Angeles, State of California, said J. E. Siu being a person having good reason to inquire into the nationality status of the defendant, that he, the defendant, was a citizen of the United States, whereas in truth and in fact, as the defendant then and there well knew, the defendant had not been naturalized, had not been admitted to citizenship, and was not otherwise a citizen of the United States.”

I have just read you the two counts remaining in the original indictment. The new indictment contains one count in which the defendant is accused as follows:

“On or about November 1, 1945, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Aaron Smehoff, alias Allen Smiley, did knowingly, willfully, falsely, and fraudulently represent to the Los Angeles Police Department, a department and agency of the City of Los Angeles, State of California, having good reason to inquire into the nationality status of the defendant, that he, the de-

fendant, was a citizen of the United States, whereas, in truth and in fact, as the defendant then and there well knew, the defendant had not been naturalized, had not been admitted to citizenship, and was not otherwise a citizen of the United States.”

You will note that each of the three offenses charged is the same type of offense, that is to say, they are three separate accusations of separate alleged offenses against the same law. I will not read the pertinent portions of that law to you:

“(a) It is hereby made an offense for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise, and whether an employee of the Government of the United States or not——

“ * * *

“(18) Knowingly to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States.”

The word “falsely” as used in the indictment as describing the representation as to citizenship alleged to have been made by the defendant, means a representation made that is not true and that the party making it knows is not true at the time it is made, and the party who makes it makes it at the time for the purpose of having the one to whom it is made believe it as true, to the advantage and benefit of the one making it.

The failure of a defendant to take the witness stand and testify in his own behalf does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against such defendant, nor should this fact enter into the discussions or deliberations of the jury in any manner.

A defendant's plea of not guilty to the indictment puts in issue every material allegation of fact contained in the indictment.

You are further instructed that throughout the trial the defendant's plea of not guilty serves as his continuing denial of the evidence offered against him by the prosecution pursuant to its ever present burden of proof.

You must clearly bear in mind that when the Court speaks of innocence, or of a circumstance being susceptible of a hypothesis of innocence, the word innocence is not used in the sense of pure, moral, free from venality, or free from wrongdoing. What is meant is innocence of the particular and specific crime charged in the indictment.

Circumstantial evidence, to warrant a conviction in a criminal case, must be of such character as to exclude every reasonable hypothesis but that of guilt of the offense charged to have been committed by the defendant, or in other words, the facts proved must be all consistent with and point to his guilt only, and inconsistent with his innocence. The hypothesis of guilt should flow naturally from the facts proved, and be consistent with them all. If

the evidence can be reasonably reconciled either with the theory of innocence or with guilt, the law requires that the defendant be given the benefit of the doubt, and that the theory of innocence be adopted.

You are instructed that under the charge in each count of this indictment that the burden is on the prosecution to establish beyond a reasonable doubt each of the following elements:

1. That the defendant was not at the time of making the alleged representation a citizen of the United States.

2. That he made the representation to the person mentioned in the indictment.

3. That at the time of making said representation that the defendant then and there knew that it was false.

4. That the defendant willfully made such false representation.

5. That he fraudulently made the representation of citizenship.

6. That the person to whom such representation was made had a good reason to inquire into the nationality status of the defendant.

The Court instructs you with reference to the allegation in the indictment that the person to whom the alleged false representation of citizenship was made "had a good reason to inquire into the nationality status of the defendant" that the phrase "good reason to inquire" means more than any reason, or which might be deemed by such person

inquiring to be a good reason; it means as applied to this case that the public officer inquiring had an adequate reason or right in law in furtherance of his official authority and duty to ascertain the defendant's citizenship.

You are further instructed that even though you find that the defendant made a false representation of citizenship to the persons or any one of the persons named in the indictment, you must nevertheless find the defendant not guilty if you find such representation was made "as a mere boast" or "jest" or "to stop the prying of some busy-body."

You are further instructed that the word "falsely" as used in this indictment suggests more than a mere untruth and includes "perfidiously," "treacherously," or "with intent to defraud."

Before you may convict you must further find beyond a reasonable doubt that such representation was not due to surprise, inadvertence or mistake, or duress, but due to "willfulness." "Willfulness" means more than "intentional" or "voluntary"; it means done with a bad purpose, without justifiable excuse, without ground for believing it lawful.

As applied to this case, "willfulness" means that before you may convict, you must believe beyond a reasonable doubt the defendant represented that he was a citizen of the United States as alleged, and that such representation was not only knowingly false but also given with a bad purpose, without justifiable excuse, and without ground for believing it lawful.

You are instructed that to "represent oneself"

as a citizen, as set forth in the indictment, means to hold oneself forth as, and to affirmatively claim to be, a citizen of the United States.

Before you can convict the defendant you must further find beyond a reasonable doubt that the person inquiring concerning the nationality status of defendant was engaged in an inquiry concerning a matter which made the nationality status of the defendant relevant and material to the matter under consideration.

Before you may convict the defendant you must further find beyond a reasonable doubt that such representation was not only knowingly false and due to willfulness, but was made for a fraudulent purpose.

As applied to this case, "fraudulent purpose" means that such representation was not only knowingly false and due to willfulness, but was made with intent to deceive such persons as to a material matter.

While it is the duty of the jurors to confer and deliberate with one another before arriving at a verdict, nevertheless, the verdict which you render must represent the real judgment and honest conclusion of each of you. If any juror after such deliberation, conscientiously reaches a decision on the facts, he has no right to surrender his decision to the opinion of the majority for the purpose of preventing a disagreement or for the purpose of arriving at a compromise.

By the finding of an indictment no presumption whatsoever arises to indicate that a defendant is

guilty, or that he has had a connection with, or responsibility for, the act charged against him. A defendant is presumed to be innocent at all stages of the proceeding until the evidence introduced on behalf of the Government shows him to be guilty beyond a reasonable doubt. And this rule applies to every material element of the offense charged. Mere suspicion will not authorize a conviction. A reasonable doubt is such a doubt as you may have in your minds when, after fairly and impartially considering all of the evidence, you do not feel satisfied to a moral certainty of the defendant's guilt. In order that the evidence submitted shall afford proof beyond a reasonable doubt, it must be such as you would be willing to act upon in the most important and vital matters relating to your own affairs.

The defendant is not called upon to produce any evidence whatsoever as to his innocence.

We are here for the purpose of trying the issues of fact that are presented by the specific charge in this indictment only and the plea of the defendant thereto. This duty you should perform uninfluenced by passion or prejudice on account of the nature of the charge against the defendant. You are to be governed, therefore, solely by the evidence introduced in this trial, and the law as given you by the court. The law will not permit jurors to be governed by conjecture, passion or prejudice, public opinion or public feeling.

Reasonable doubt is not a mere possible or imaginary doubt or a bare conjecture; for it is

difficult to prove a thing to an absolute certainty.

You are to consider the strong probabilities of the case. A conviction is justified only when such probabilities exclude all reasonable doubt as the same has been defined to you. Without it being restate or repeated, you are to understand that the requirement that a defendant's guilt be shown beyond a reasonable doubt is to be considered in connection with and as accompanying all the instructions that are given to you.

In judging of the evidence, you are to give it a reasonable and fair construction, and you are not authorized, because of any feeling of sympathy or other bias, to apply a strained construction, one that is unreasonable, in order to justify a certain verdict when, were it not for such a feeling or bias, you would reach a contrary conclusion. And, whenever, after a careful consideration of all of the evidence, your minds are in that state where a conclusion of innocence is indicated equally with a conclusion of guilt, or there is a reasonable doubt as to whether the evidence is so balanced, the conclusion of innocence must be adopted.

You are the sole judges of the credibility and the weight which is to be given to the defferent witnesses who have testified upon this trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; by the character of his testimony, or by evidence affecting his character for truth, honesty and integrity or his motives; or by contra-

dictory evidence. In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness, or may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable men. You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relation which he bears to the Government, the manner in which he might be affected by the verdict and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility.

If a witness is shown knowingly to have testified falsely on the trial touching any material matter, the jury should distrust his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness' testimony.

You are not limited in your consideration of the evidence to the bald expressions of the witnesses; you are authorized to draw such inferences from the facts and circumstances which you find have been proved as seem justified in the light of your experience as reasonable men and women.

There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that by which men give their attention to any question depending upon evidence presented to them. You are expected to use your good sense, consider the evidence for the purposes only for which

it has been admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment; and while remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no such doubt remains the Government is entitled to a verdict.

Jurors are expected to agree upon a verdict where they can conscientiously do so; you are expected to consult with one another in the jury room and any juror should not hesitate to abandon his own view when convinced that it is erroneous.

In determining what your verdict shall be you are to consider only the evidence before you. Any testimony as to which an objection was sustained, and any testimony which was ordered stricken out, must be wholly left out of account and disregarded.

The opinion of the judge as to the guilt or innocence of the defendant, if directly or inferentially expressed in these instructions, or at any time during the trial, is not binding upon the jury; for to the jury exclusively belongs the duty of determining the facts.

The law you must accept from the court as correctly declared in these instructions.

Have I omitted anything, gentlemen?

Mr. Christensen: I think not, your Honor.

The Court: Two forms of verdict have been prepared for your guidance. Omitting the title of the court and cause, one reads:

“We the jury in the above-entitled cause find the defendant Allen Smiley, charged as Aaron Smehoff, as charged in Count One of the indictment, and as charged in Count Three of the indictment.”

The other reads:

“We the jury in the above-entitled cause find the defendant Allen Smiley as charged in the indictment.”

On those blanks you will insert whatever your finding may be, either “Guilty” or “Not Guilty.”

The guilt or innocence of the defendant as to each count must be determined separately.

After you have agreed upon a verdict you will have it signed by your foreman, whom you will select when you reach your jury room, and return into open court.

Any verdict agreed upon, of course, must be the unanimous verdict of the jury.

I think you may retire in the custody of the bailiff.

The Clerk: Shall I swear the bailiffs?

The Court: Very well. Swear the bailiffs.

(Whereupon the bailiffs were sworn.)

The Court: You may retire now.

(Whereupon the jury retired to deliberate.)

[Endorsed]: Filed Sept. 21, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 65, inclusive, contain the original Indictment in case No. 20069; Motion to Dismiss in case No. 20069; Indictment in case No. 20604; Defendant's Requested Instructions; Stipulation re and Defendant's Requested Supplemental Instructions No. 8s and 9s; Verdicts in each of cases Nos. 20069 and 20604; Motion for New Trial; Motion in Arrest of Judgment; Judgment and Commitment in each of cases Nos. 20069 and 20604; Notice of Appeal; Statement of Points on Appeal; Stipulation; Designation of Record on Appeal and Order Extending Time to Docket Appeal and full, true and correct copies of Minute Orders Entered July 19, 1948 in case No. 20069, June 7, 1949, in each of cases Nos. 20069 and 20604, July 12, 1949, and August 1, 1949, in each of cases Nos. 20069 and 20604 which, together with copy of reporter's transcript of proceedings on June 7, 1949, July 12, 13, and 14, 1949, and August 1, 1949, and original plaintiff's exhibits Nos. 1 to 12, inclusive, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$3.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 7 day of October, A.D., 1949.

EDMUND L. SMITH,
Clerk.

[Seal] By: /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12375. United States Court of Appeals for the Ninth Circuit. Allen Smiley, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed October 10, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
Ninth Circuit
No. 12375

ALLEN SMILEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

DESIGNATION OF POINTS TO BE RELIED
UPON APPEAL AND DESIGNATION OF
RECORD

We hereby adopt as the designation of points to be relied upon and record to be printed on appeal the Designation of Points to be Relied On and Record to be Printed, as filed with the United States District Court.

/s/ OTTO CHRISTENSEN,
Attorney for Appellant
Allen Smiley.

[Endorsed]: Filed Oct. 20, 1949.

